Supreme Court, U.S.
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87-602

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM A. KILPATRICK, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a federal court may dismiss an indictment before trial based upon its supervisory powers without a finding of prejudice to the defendant in order to protect the integrity of the judicial system?

II. Whether a Court of Appeals may substitute its own findings of fact even when the facts found by the District Court were specifically premised on credibility determinations based on live testimony?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals for the Tenth Circuit were the United States of America, William A. Kilpatrick, Declan J. O'Donnell, Sheila C. Lerner, Michael J. Alberga, C.S. Gill, C.M. Smith, and the Bank of Nova Scotia.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, by and through counsel William A. Cohan and Darold W. Killmer of the law firm of Cohan, Greene & Killmer, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinions of the district and appellate judges are reprinted in the appendices to this petition and reported as indicated below:

(1) *United States v. Kilpatrick*, 575 F.Supp. 325 (D. Colo. 1983) (per Winner, J.).

(2) *United States v. Kilpatrick*, 594 F.Supp. 1324 (D. Colo. 1984) (per Kane, J.).

(3) *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987) (per Holloway, J. and Bohanon, J., with a dissenting opinion by Seymour, J.).

(4) *Blondin v. Winner*, 822 F.2d 969 (10th Cir. 1987) (per Seymour, J.).

JURISDICTION

The opinion of the court of appeals was filed on June 18, 1987. A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 19, 1987. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the Grand Jury and Due Process clauses of the Fifth Amendment to the United States Constitution, 18 U.S.C. §§ 6002 and 6003, and Rule 6 (d) and (e) of the Federal Rules of Criminal Procedure, which collectively constitute Appendix F.

STATEMENT OF THE CASE

A. Procedural History

After a twenty month investigation before two successive grand juries, this case began with the return of a twenty-seven count indictment charging seven individuals and the Bank of Nova Scotia with conspiracy, and charging several of the individual defendants with mail fraud and/or tax fraud.[1] On February 21, 1983, the district court, the Honorable John L. Kane Jr., presiding, dismissed the first twenty-six counts of the indictment for failure to charge a crime and as improperly pleaded. *United States v. Kilpatrick*, 594 F.Supp. 1324, 1327 (D.

[1] While several defendants were charged, this Petition for Writ of Certiorari is made on behalf of Defendant-Petitioners Kilpatrick, O'Donnell, and Lerner.

Colo. 1984).[2] Judge Kane's opinion is made a part of this Petition as Appendix C. The government appealed the dismissal of those counts.[3]

On August 8, 1983, after briefing but before oral argument, the Tenth Circuit Court of Appeals entered an order partially remanding the case to the district court to determine whether misconduct on the part of the government prosecutors in connection with the grand jury investigation and presentation constituted additional grounds for dismissal.

Before and immediately after the partial remand by the Tenth Circuit, the Honorable Fred M. Winner, Senior United States District Judge, presided over post-trial motions hearings following a guilty verdict against Mr. Kilpatrick on Count 27 of the indictment. On August 25, 1983, at about the time of his retirement from the bench, Judge Winner issued a Memorandum decision which, among other things, summarized the status of the hearings which were being reassigned to Judge Kane. Further, Judge Winner ordered that the government provide defendants with copies of transcripts of all proceedings that occurred before the grand jury. After what Judge Kane has called "some bizarre episodes of procedural novelty," Judge Winner's opinion was published. *See United States v. Kilpatrick*, 575 F.Supp. 325 (D. Colo. 1983), made Appendix E of this Petition. Judge Winner also granted Kilpatrick a new trial on the obstruction of justice count.

[2] The twenty-seventh count, charging Defendant Kilpatrick with obstruction of justice, was not initially dismissed.

[3] In addition to dismissing the counts against the individual defendants, Judge Kane dismissed the charges in which the Bank of Nova Scotia (Bank) was named on the ground that the indictment failed to allege that the Bank or any of its representatives had the requisite knowledge and intent to commit the crime charged. *Kilpatrick*, 594 F.Supp. at 1327. The government appealed the dismissal of these counts also.

After holding ten days of hearings, District Judge Kane dismissed all twenty-seven counts of the indictment because of prosecutorial misconduct. His Order was as follows:

> Based on the foregoing I hold and ORDER as follows:
>
> 1. The indictment is dismissed because of the numerous violations of Rule 6(d), Fed.R.Crim.P.
>
> 2. The indictment is dismissed because of the numerous violations of Rule 6(e), Fed.R.Crim.P.
>
> 3. The indictment is not dismissed solely for the use of "pocket immunity" in contravention of 18 U.S.C. Secs. 6002 and 6003.
>
> 4. The indictment is not dismissed solely for violations of the Fifth Amendment to the United States Constitution.
>
> 5. The indictment is not dismissed solely for the knowing and deliberate presentation of misinformation to the grand jury.
>
> 6. The indictment is not dismissed solely for violations of the Sixth Amendment to the United States Constitution.
>
> 7. The indictment is dismissed because of the totality of the circumstances which include numerous violations of Rule 6(d) and (e), Fed.R.Crim.P., violations of 18 U.S.C. Secs. 6002 and 6003, violations of the Fifth and Sixth Amendments to the United States Constitution, knowing presentation of misinformation to the grand jury and mistreatment of witnesses.

Kilpatrick, 594 F.Supp. at 1353.

The government appealed these dismissals, and the appeals were consolidated in the Tenth Circuit with the appeals challenging the initial dismissals.

On June 18, 1987, a split panel of the Tenth Circuit Court of Appeals reversed the district court and

remanded the case with instructions to reinstate all counts of the indictment. *United States v. Kilpatrick*, 821 F.2d at 1456 (10th Cir. 1987), is made a part of this petition as Appendix B. Judge Seymour dissented from the decision.

A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Tenth Circuit Court of Appeals on August 19, 1987. On September 3, 1987, the Tenth Circuit granted a motion to stay the issuance of the mandate until October 3, 1987. This stay was extended until October 12, 1987 upon Petitioner's motion filed September 29, 1987.

B. Background

As Senior District Judge Fred M. Winner noted, "[t]o fully cover all of the headaches of this case would require a volume." *United States v. Kilpatrick*, 575 F.Supp. 325, 326 (D.Colo. 1983). Throughout the course of the twenty month investigation and presentation to the grand jury, government attorneys engaged in systematic improprieties and misconduct sufficiently severe that three of the five judges who have evaluated that conduct found it required dismissal of the indictment (i.e., Judge Winner, Judge Kane and Judge Seymour). Judge Seymour noted in her dissenting opinion in the Court of Appeals that:

> It is beyond argument that the Government's conduct in this case was outrageous. As set out in two district court opinions, *United States v. Kilpatrick*, 594 F.Supp. 1324 (D.Colo. 1984), and *United States v. Kilpatrick*, 575 F.Supp. 325 (D.Colo. 1983), the record contains evidence constituting a laundry list of serious improprieties, most of which the majority neither disputes nor condones. Government officials repeatedly violated Fed.R.Crim.P. 6(d) by presenting two witnesses to the grand jury at the same time. *See* maj. op. at 1467-68, 1470. The Government

routinely flouted the secrecy provisions of Fed.R. Crim.P. 6(e). First, it improperly used grand jury information in civil tax audits of taxpayers who invested in the tax shelters at issue, *see* maj. op. at 1471; second, it improperly disclosed the identity of the grand jury targets to people who were not grand jury witnesses who had formerly represented the tarness and professional relationships, *see id.* at 1472, and third, it improperly swore to secrecy two grand jury witnesses who had formerly represented the targets in S.E.C. proceedings involving the same tax shelters, *see id.* at 1472. During a recess a Government attorney mistreated a tax expert, who had testified before the grand jury favorably to the targets, by shouting insults at and intimidating him in the presence of grand jurors, other witnesses, and attorneys. *See id.* at 1472-73.

In addition, the Government attorney paraded seven witnesses before the grand jury knowing that they would invoke their Fifth Amendment privilege to refuse to answer any questions. I cannot agree with the majority's conclusion in footnote 19 that any prejudice arising from this presentation to the grand jury was eliminated by the prosecutor's admonition. The grand jurors had previously questioned the prosecutors on the use of the privilege, displayed frustration over its invocation, and discussed pursuing the matter with the district court to test the privilege. [Cite to record]. Significantly, one grand juror stated: "I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do." [Cite to record]. In view of this candid admission, the potential for prejudice arising from seven witnesses' refusal for fear of incrimination to discuss their involvement in the very matters upon which the grand jury was asked to indict cannot be denied. *Cf. United States v. Coppola*, 479 F.2d 1153, 1160 (10th Cir. 1973) (condemning conscious effort by Government to derive evidentiary value from adverse inference arising from invoking the privilege). Consequently, this

> court has held that it is improper for the Government to call a witness knowing that he will assert his Fifth Amendment privilege. *See id.*; *see also United States v. Crawford*, 707 F.2d 447, 449 (10th Cir. 1983).

United States v. Kilpatrick, 821 F.2d at 1476 (Seymour, J., dissenting) (footnote omitted).

Judge Kane dismissed the indictment, outlining an astounding chronology of prosecutorial misconduct. In the section of his opinion entitled "FACTS ESTABLISHED BY THE RECORD," Judge Kane explained that various IRS Special Agents had been sworn in as "agents of the grand jury" despite instructions by the impaneling court that the grand jury should maintain its independence and not develop into a "prosecutor's agent." *Kilpatrick*, 594 F.Supp. at 1328. Judge Kane specifically found that "the prosecutor's description to the grand jury of the role of a 'grand jury agent' clearly misled the grand jury as to the appropriate role of the IRS agents in the proceedings." *Id.* The grand jury was consistently reminded of the unique role of the "grand jury agents", and urged to rely upon the IRS agents as their (the grand jury's) agents. These agents did more than assist the prosecutors in the investigation. They were used to summarize evidence in front of the grand jury. These summaries, Judge Kane found, were frequently inaccurate and seriously misleading. *Id.* at 1330, 1339-1341. It was also clear that the "grand jury agents" were not present as witnesses. They were not sworn; they appeared together; they were not examined; and they were often unaccompanied by government attorneys. *Id.* at 1330. The record indicates that these agents may have convened the grand jury sessions without government counsel in order to read testimony. *Id.*

The district court also found that "[d]uring the course of the grand jury investigation, the government representatives systematically disregarded the strictures of Rule 6(e)." *Id.* at 1331. Numerous individuals at all

levels of the IRS were improperly permitted access to the grand jury materials in violation of Rule 6(e). Beyond disclosure, however, are the instances of improper use of the grand jury materials. *Id.* at 1332-34. Finally, the district court found that "[s]everal instances demonstrate blatant disregard for the time-honored tradition of grand jury secrecy." *Id.* at 1334. Letters were sent to individuals beyond the subpoena power of the grand jury, with whom it was understood the targets had ongoing business and professional relationships. The letters were written on the letterhead of the U.S. Attorney, but signed by supposed agents of the grand jury. Judge Kane found these letters not only misleading in terms of the capacity in which they were sent, but also presented a clear danger to the acknowledged business and professional relationships. *Id.* The impropriety of publicly identifying targets in these letters was readily apparent to Judge Winner:

> [T]he identity of the persons and the transactions which were under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that.

575 F.Supp. at 334.

Judge Kane found that the repeated breaches of secrecy and "prejudicial disclosure of the targets and the nature of the grand jury's investigation" extended beyond the "startling letters." 594 F.Supp. at 1335. The court wrote of one instance where grand jury information was shared with a witness and one-time potential target in an attempt to persuade him to assist in the government's investigation by suggesting that the grand jury had received evidence warranting his consideration as a target. *Id.* This witness was once left unattended in a room housing grand jury material. He admitted to seizing the opportunity to rummage through the grand jury documents. Prosecutors also accused him of making

extortionate threats to one of the targets of the investigation. *Id.*

The district court further found that "[f]or what the record reveals was clearly an improper strategic purpose, secrecy obligations in clear violation of Rule 6(e)(2), Fed.R.Crim.P., were imposed upon two grand jury witnesses." *Id.* at 1335. The government admitted to these violations, and Judge Kane found that "the confessed violations of Rule 6(e) were neither innocent nor inadvertent." *Id.* Both of the witnesses upon whom secrecy obligations were imposed occupied positions as attorneys who had formerly represented two targets of the investigation. The record clearly illustrates that the government attorneys were well aware that such secrecy obligations are prohibited by Rule 6(e) (and by the United States Attorneys' Manual), and, although provided with ample opportunity, the government attorney was unable to offer any legitimate reason for his transgressions. *Id.* at 1336.

Next, the district court found that "[d]uring this investigation, Department of Justice attorneys ignored entirely the federal immunity statute (18 U.S.C. Secs. 6001, *et seq.*) which prescribes the congressionally authorized procedure for conferring grants of immunity and, instead, secured testimony by engaging extensively in what I have described as the 'damnable practice' of bestowing 'informal immunity' through 'letters of assurance.'" *Id.* at 1336. The prosecutors undertook what was described as a "liberal policy" of distributing informal immunity to witnesses. At no time was an effort made to obtain statutory immunity for any witness. The government attorneys readily conceded that they chose this method simply for the sake of expediency—to by-pass the review established by Congress in the statutory scheme. *Id.* at 1337. The record reveals that the prosecutors were motivated at least in part by the fact that the informal immunity process would avoid the statistical

compilation that Congress indicated as among its purposes for establishing the statutory procedure. *Id.* Both Judge Kane and Judge Winner noted that the use of this informal immunity served to intimidate the witnesses, leaving them with the fear that unless their testimony pleased the government, the government might withdraw its assurances. *Id.*, 594 F.Supp. at 1338; 575 F.Supp. at 335.

The district court next addressed the events surrounding the "abusive and dubious practice of calling witnesses who had not been issued letters and having them invoke their Fifth Amendment privilege before the grand jury regarding the targets and the transactions under investigation, knowing in advance that they would do so." 594 F.Supp. at 1338. Judge Kane found that:

> In all, seven witnesses were called to invoke their privilege in February and March, 1982. That the purpose was to prejudice the grand jury against the targets and the tax shelter transactions under investigation, and not to lay a statutory predicate for immunizing the witnesses (which the prosecutor never did) cannot de denied.

Id. It should be noted that six of these seven witnesses were called *after* the discussion between the prosecutor and the grand juror who stated, "I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do." G.J. Tr. Jan. 5, 1982, 9:09 A.M. at 22-25. 821 F.2d at 1474.

The district court proceeded to describe the presentation of summaries of "evidence" against the targets. Although the Tenth Circuit Court of Appeals labored under the impression that "no claim was made nor did the [district] court find that the Government attorneys used perjured testimony, knowingly or unknowingly, before the grand jury," *Kilpatrick*, 821 F.2d at 1470 fn. 12, the district court *did* find "the prosecutor erroneously

suggested that the 'evidence' indicated that the Bank of Nova Scotia representatives were familiar with the operation of Kilpatrick's business and that the IRS was to be defrauded by virtue of the banking activity. [Citation to Record]. *No evidence of the kind suggested by the prosecutor had been presented to the grand jury.*" 594 F.Supp. at 1339 (emphasis supplied). The court found that on "the vital issue of the bank's knowledge and intent, however, it is clear that [the special agent's] testimony was both misleading and inaccurate." *Id.* at 1339. Judge Kane concluded that the mischaracterizations reasonably could not have been expected to be picked up by the grand jurors and "undoubtedly formed a substantial basis" for the indictment.

The district court also expounded on how the prosecutors committed numerous *Massiah* violations by interviewing employees of the Bank of Nova Scotia outside of the presence of counsel. Although the prosecutor was fully aware that the bank, an indicted defendant, was represented by counsel, he did not feel constrained by this Court's dictates in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). The prosecutor felt secure that "if he committed a constitutional violation of the type identified in *Massiah*, the only likely sanction was the suppression of the evidence in the government's case-in-chief. In the prosecutor's words, 'no indictment has ever been dismissed because of [a *Massiah* violation]' " 594 F.Supp. at 1342.

Lastly, the district court described the incident where a government attorney browbeat and intimidated a tax expert who testified before the grand jury favorably to the targets of the investigation. The prosecutor's heated argument occurred outside of the grand jury room but in front of attorneys, members of the grand jury, and other witnesses. Such prosecutorial misconduct prompted one of the witnesses to the incident, a former Department

of Justice and Colorado United States Attorney's Office attorney, to write a letter to Judge Sherman G. Finesilver of the District of Colorado reporting the incident. The tax expert, Professor Hjorth, testified that the prosecutor's conduct was so abusive that he would never again appear as an expert witness in a similar proceeding. *Id.* at 1343.

The district court dismissed the indictment based upon the violations of Rule 6(d) and (e), Fed.R.Crim.P., and upon the "totality of the circumstances" surrounding the cumulation of all of the other incidents of prosecutorial misconduct. Judge Kane noted that

> While the remedy of dismissal is extraordinary, it may be used 'to insure proper standards of conduct by the prosecution.' [Citation]. District courts are also empowered to dismiss indictments because of inherent supervisory powers which protect the integrity of the judicial system. [Citation]. Isolated errors and improprieties do not require dismissal of the indictment. It is only when the government engages in deliberate conduct which interferes with the grand jury's independent function or damages the integrity of the judicial process that the remedy of dismissal becomes necessary. Because I find that the government engaged in a pattern of conduct calculated to infringe the grand jury's ability to exercise independent judgment, the indictment must be dismissed.

Id. at 1351-52, *quoting United States v. Anderson*, 577 F. Supp. 223, 230 (D. Wyo. 1983).

REASONS FOR GRANTING THE PETITION

I. REQUIRING PROOF OF PREJUDICE AS A PREREQUISITE TO DISMISSING AN INDICTMENT BASED ON THE COURT'S SUPERVISORY POWERS CONFLICTS WITH DECISIONS OF THIS COURT AND WITH OTHER CIRCUIT COURTS OF APPEALS

A. The Tenth Circuit Applied a Requirement of Prejudice as a Prerequisite to Dismissal Pursuant to the District Court's Supervisory Powers.

The Tenth Circuit's majority opinion recognized that there are at least two distinct bases upon which a federal court might dismiss an indictment: (1) The Fifth Amendment Due Process Clause, and (2) Supervisory Powers inherent in federal courts.

> A court may dismiss [an indictment] on the bases of the Fifth Amendment Due Process or Grand Jury Clauses. [Footnote omitted]. The constitutional concerns focus on the fairness to the defendant and on remedying any harm to his basic rights. *See McClintock*, 748 F.2d at 1284; *Pino*, 708 F.2d at 530-31.
>
> A court may also dismiss an indictment by relying on its supervisory powers. *See Pino*, 708 F.2d at 530. The supervisory powers theory is premised on the federal courts' inherent ability to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). The supervisory powers theory focuses on deterring illegality and protecting judicial integrity. . . . [Citations omitted] *However, the common theme of the cases is that prosecutorial misconduct alone is not a valid reason to dismiss an indictment.* (Emphasis supplied).

United States v. Kilpatrick, 821 F.2d at 1465.

In her dissenting opinion, Circuit Judge Seymour crystallized her contrary conclusions concerning the ma-

jority's requirement of proof of prejudice to support dismissal based on supervisory powers:

> I respectfully dissent from the view of the majority that prejudice to the defendant must be shown before a court can exercise its supervisory powers to dismiss an indictment on the basis of egregious prosecutorial misconduct. I would affirm.
>
> It is beyond argument that the Government's conduct in this case was outrageous. As set out in two district court opinions [see Appendices C and E], the record contains evidence constituting a laundry list of serious improprieties, most of which the majority neither disputes nor condones. . . .
>
> • • •
>
> Although acknowledging most of the improprieties set out in the lower court opinions, the majority does not agree with the district court that the Government's actions impaired the Grand Jury's ability to exercise its independent judgment, *which is the standard that must be met before the indictment may be dismissed under the Fifth Amendment.* [Emphasis added]. Significantly, the majority also concludes that the sanction of dismissing the indictment is not a proper exercise of a district court's supervisory power unless the same standard is met, that is, unless there is a legally sufficient showing that the Government's misconduct adversely affected the grand jury's independence. Putting aside whether the impact of the Government prosecutors' behavior on the decision-making process of this grand jury can realistically be evaluated, I do not believe that such a showing is a prerequisite to the pre-trial dismissal of an indictment under a court's supervisory power.

Id. at 1476-77.

B. Application of the Requirement of Prejudice as a Prerequisite to a Court's Exercise of its Supervisory Powers Conflicts with Decisions of this Court.

This Court has recently and repeatedly held that federal courts must exercise their supervisory powers to protect the integrity of the judicial system, regardless of demonstrable prejudice. The decision last term in *Young v. United States ex rel. Vuitton Et Fils S.A.*, —— U.S. ——, 107 S.Ct. 2124, —— L.Ed.2d —— (1987), noted:

> In this case, we rely on our supervisory authority to avoid the necessity of reaching any constitutional issues. We are mindful that "reversals of convictions under the court's supervisory power must be approached 'with some caution' and with a view toward balancing the interests involved." [Citation omitted]. Where the interest infringed is sufficiently important, however, *we have not hesitated to find actual prejudice irrelevant when utilizing supervisory authority. See, e.g., Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946) (using supervisory power to find error in exclusion of women from grand jury, and dismissing indictment).

Id., 107 S.Ct. at 2138-39 fn. 21 (emphasis added). In *Young*, this Court held some errors are so fundamental that they may not be deemed harmless. "An error is fundamental if it undermines confidence in the integrity of the criminal proceeding." *Id.*, 107 S.Ct. at 2139.

This Court's recent holding in *Vasquez v. Hillery*, —— U.S. ——, 106 S.Ct. 617, 623-4, —— L.Ed.2d —— (1986), reflects a crucial conclusion in Judge Seymour's dissent:

> When consitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm . . . and we must presume that the process was impaired.
>
> • • •
>
> The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.

In *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), this Court found it unnecessary to determine whether the defendants had been prejudiced by a constitutional violation before exercising its supervisory power to reverse a conviction. Justice Frankfurter wrote for the Court:

> [T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.

Id. at 340, 63 S.Ct. at 613.

C. The Tenth Circuit's Decision Highlights a Conflict Between the Circuits Which this Court Should Resolve.

As Judge Seymour pointed out in her dissenting opinion:

> The circuits are split on the need to show prejudice. *See United States v. Holloway*, 778 F.2d 653, 658-59 (11th Cir. 1985) (noting authority on both sides of issue), *cert. denied*, —— U.S. ——, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986).

Kilpatrick, 821 F.2d at 1479 (Seymour, J., dissenting).

The Second and Third Circuits have held that a showing of prejudice is not required to dismiss an indictment. *See United States v. Jacobs*, 547 F.2d 722 (2nd Cir. 1976), *cert. dismissed*, 436 U.S. 431 (1978); *United States v. Estepa*, 471 F.2d 1132 (2nd Cir. 1972); *United States v. Serubo*, 604 F.2d 807 (3rd Cir. 1979).

The Fifth and Sixth Circuits agree with the Tenth Circuit that a showing of prejudice is required. *See United States v. McKenzie*, 678 F.2d 629 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982); *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985).

This Court should grant the Petition and resolve the conflict among the circuit courts regarding this important issue of law, which arises in a vast number of criminal cases throughout the country.

II. RECENT DECISIONS OF THIS COURT PROHIBIT THE *DE NOVO* REVIEW ENGAGED IN BY THE CIRCUIT COURT

A. The Tenth Circuit Acknowledged that Review of Findings of Fact is Governed by the "Clearly Erroneous Standard," Then Engaged in *De Novo* Review.

The majority opinion did not explain why it reviewed certain findings of fact under the clearly erroneous standard and others *de novo*. *Kilpatrick*, 821 F.2d at 1467. While initially acknowledging that review was governed by the clearly erroneous standard, the court explicitly engaged in *de novo* review in critical areas. *See Campbell v. United States*, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963); *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

The majority agreed that there were violations of Rule 6(d), Fed.R.Crim.P. *Id.* at 1467. They further agreed that special agents were not placed under oath while presenting evidence, and that prosecutors often would leave the agents alone with the grand jury. *Id.* at 1468. The majority accepted these facts, but, rejected the trial court's finding of prejudice, and accordingly, found such facts insufficient to support dismissal of the indictment—even with the cumulation of all the other prosecutorial misconduct. *Id.*

Concerning the Rule 6(e) violations, however, the Tenth Circuit intensified its standard of review. Here, the district court *had* found a showing of prejudice. ("In the instant case, however, such showing of prejudice has been convincingly made.") 594 F.Supp. at 1348. The record is replete with descriptions of the systematic violations of Rule 6(e), and voluminous material and persuasive evidence of prejudice. Nevertheless, instead of applying the deferential standard of review, the Tenth Circuit said:

> Assuming that this allegation finds support in the record, we fail to see how the grand jury's independence was usurped in such a significant way as to amount to grand jury abuse.

Id., 821 F.2d at 1471. The majority repeatedly rejected the district court's findings. For example, the court noted that:

> [T]he district court found that the prosecutor's mistreatment of a witness favorable to the defense prejudiced the defendants. We find the mistreatment of the witness, an expert on tax matters, unjustifiable. The mistreatment occurred during a recess but within the hearing of several grand jurors, witnesses, and attorneys. . . . We conclude that the defendants have failed to show how the grand jury's independence was breached.

Id. at 1472-73.

B. *De Novo* Review Resulted In Substitution of Facts Contrary to those Found Even When Specifically Premised on Credibility Determinations Based on Live Testimony.

Even more remarkable than the abbreviated attention given to the obvious impeachment of this witness' testimony was the majority's reticence regarding the improper use of "pocket immunity." The trial court discussed in detail the problems produced by the govern-

ment's informal immunity grants to witnesses before the grand jury. 575 F.Supp. 325, 334-336. Specifically, the court found:

> . . . that there was not compliance with 18 U.S.C. §§ 6002-6003, . . .
>
> This is especially troublesome in this case in light of the record made concerning the witness Richard Bell who was . . . represented by his brother, Malcolm, an attorney practicing in New York City and *a witness I found to be straightforward, fair, convincing, and most generous to* [*the prosecutor*]. (Emphasis added). Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told by [the prosecutor] that if Richard "testified for Mr. Kilpatrick, all bets are off." Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of "all bets are off" wouldn't confront us. Under the statute, all bets weren't off if Richard Bell testified for Mr. Kilpatrick, although he could have been prosecuted for perjury if he testified falsely, but incriminating testimony given by him couldn't be used in a prosecution of the charges with which he was threatened. . . . Grand jurors can't be expected to know the requirements of law concerning lawful immunity grants, and if the prosecutor ignores the statute, the grand jury should be told that witnesses are testifying under a side deal made with the witness by the prosecutor. The nature and informality of the immunity grant might bear on a grand juror's evaluation of the credibility of a witness, especially if the grand juror knew of the short cut used by the prosecution. 575 F.Supp. 325, 335-36.

This crucial finding by the trial court (and others) was given due deference by the dissenting opinion's conclusion that:

> Based on its finding that the Government's conduct was intentional, which includes credibility assess-

ments this court may not lightly disregard, the district court found that "the substantial departures of prosecutors in this case from established notions of fairness, from clearly articulated rules of law, from specific rules of procedure and, indeed, from the Department of Justice's own manual and operating directives constitute systematic and pervasive overreaching. *Id.* The court concluded that the cumulative effect of the Government's conduct prevented the grand jury from undertaking independent action. *Id.* at 1353. 821 F.2d at 1476-77.

The majority completely overlooked the prejudicial impact of the informal immunity granted in this case, devoting a total of two sentences to this topic, which are quoted in their entirety to demonstrate the magnitude of this failure to recognize:

> Second, we have held that the use of "informal immunity," which has been frequently upheld, is entirely proper. [Citation omitted]. Moreover, the defendants have failed to show how the use of informal immunity prejudiced the grand jury. 821 F.2d at 1470. [Footnote omitted].

But the most dramatic demonstration of the majority's apparently unconscious nullification of critical and carefully considered conclusions by the trial court appears in a footnote at 821 F.2d 1470, following the majority's observation that "summaries of evidence given before the grand jury are permissible and often helpful, especially in complicated cases such as this."

> Fn. 12. We note that no claim was made nor did the court find that the Government attorneys used perjured testimony, knowingly or unknowingly before the grand jury.

The majority's assertion that the trial court did not find that perjured testimony was used constitutes pivotal, decisive error; the trial court devoted four pages of its opinion to support its holding that:

> Mendrop's testimony was both misleading and inaccurate. In particular, Mendrop purported to "summarize" . . . the testimony presented by three witnesses. . . . An examination of the grand jury testimony, however, reveals that it was not a summary of the evidence before the grand jury. One of the witnesses whose testimony was "summarized" never appeared before either grand jury. The other two witnesses whose testimony was "summarized" did not give testimony even remotely resembling that supposedly "summarized" by Mendrop. The grand jury was never informed of those mischaracterizations or of any alternative basis for Mendrop's summary.
>
> The inaccurate "summaries" of the evidence . . . was particularly abusive for several reasons: (i) the misleading "summaries" were presented by an individual upon whom the grand jurors had been urged to rely as their "agent,"
>
> • • •
>
> In sum, the mischaracterizations reasonably could not have been expected to be picked up by the grand jurors and, undoubtedly, formed a substantial basis for the indictment. . . . 594 F.Supp. 1339-40.

The majority's misapprehension of the factual and legal conclusions comprising the opinions of the two district judges who conducted the misconduct hearings culminates in the contention that:

> The district court's opinion . . . focuses entirely on the conduct of the prosecutor and not on any resulting prejudice to the defendants.
>
> • • •
>
> The district court erred in focusing primarily on the propriety of the Government's conduct rather than on possible intereference with the integrity and independence of the grand jury.
>
> • • •
>
> Accordingly, we hold that the district court erred in its conclusions that the grand jury's function was

usurped and that the indictment was tainted with illegality, 594 F.Supp. at 1349, 1352, following the *de novo* review we feel we should conduct. *See* Part II-B, *supra*. We are also persuaded that if those determinations are ultimate fact-findings, they are clearly erroneous in light of the record. 821 F.2d 1473-74. [Footnote omitted].

This explanation contradicts the majority's earlier acknowledgment that:

> Our review of whether the prosecutors engaged in specific flagrant or egregious misconduct before the grand jury involves questions of historical fact governed by the clearly erroneous standard. . . . Here, however, the facts are essentially admitted or specifically found by the district court and the law is undisputed . . . we nevertheless conclude that the issue primarily involves the consideration of legal principles, calling for *de novo* review by the appellate court.

821 F.2d at 1467 (citations omitted).

C. *De Novo* Review and Appellate Substitution of Facts In Place of Those Found By the Trial Court Based on Live Testimony Conflicts with Decisions of this Court.

As this Court recently held in *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985):

> [I]n Federal Rule of Civil Procedure 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ." The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not

> to decide factual issues *de novo*. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. . . .
>
> • • •
>
> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. 105 S.Ct. at 1511-12.

See also Maine v. Taylor, 470 U.S. 564 (1986).

The majority erred in conducting *de novo* review and supplanting two district courts' findings of fact without determining that the trial judges' accounts of the evidence were implausible in light of the record viewed in its entirety. Since this error clearly conflicts with this Court's decisions it provides another basis for granting the writ in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted to correct the two fundamental errors made by the Court of Appeals, both of which conflict with this Court's recent decisions: (1) requiring proof of prejudice to support dismissal of an indictment based on supervisory powers; and (2) engaging in *de novo* review of the trial courts' fact findings based on credibility determinations of live testimony and substituting its own findings, without establishing that the trial courts' conclusions were implausible in light of the entire record.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM—August 19, 1987

Before Honorable William J. Holloway, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Circuit Judges and Luther L. Bohanon*, District Judge, sitting by designation.

Nos. 83-1363
84-2481

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WILLIAM A. KILPATRICK,
Defendant-Appellee.

Nos. 83-1364
84-2482

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DECLAN J. O'DONNELL,
Defendant-Appellee.

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* The Honorable Luther L. Bohanon United States District Judge for the Western District of Oklahoma, sitting by designation.

Nos. 83-1365
84-2483

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
SHEILA C. LERNER,
Defendant-Appellee.

Nos. 83-1366
83-2484

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
THE BANK OF NOVA SCOTIA,
Defendant-Appellee.

Nos. 83-1367
84-2485

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
MICHAEL ALBERGA,
Defendant-Appellee.

Nos. 83-1368
84-2486

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
C.S. GILL,
Defendant-Appellee.

These matters are before the Court for consideration of appellees' petitions for rehearing and suggestions for rehearing en banc.

Upon consideration whereof, the petitions for rehearing are denied by Judges Holloway and Bohanon, to whom these cases were argued and submitted. Judge Seymour, also a member of the hearing panel, voted to grant rehearing.

The Court having been polled on the suggestions for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Judges McKay and Seymour voted to grant rehearing en banc.

Neither Judge Luther L. Bohanon, a member of the hearing panel, nor Circuit Judge John P. Moore, participated in consideration of the suggestions for rehearing en banc.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-1363-1369, 84-2481-2487

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL, SHEILA C. LERNER, THE BANK OF NOVA SCOTIA, MICHAEL ALBERGA, C.S. GILL, and C.M. SMITH,
Defendants-Appellees.

June 18, 1987

Robert E. Lindsay, Tax Div., Dept. of Justice, Washington, D.C. (Glenn L. Archer, Jr., Asst. Atty. Gen., Robert M. Olsen, Acting Asst. Atty. Gen., Michael L. Paup, Alan Hechtkopf and James P. Springer, Tax Div., Dept. of Justice, Washington, D.C., and Robert N. Miller, U.S. Atty., Denver, Colo., were also on the brief) for plaintiff-appellant.

James E. Nesland, Ireland, Stapleton, Pryor & Pascoe, Denver, Colo., for all defendants-appellees (Theodore H. Merriam, Richard K. Rufner and Wagner & Waller, P.C., Englewood, Colo. and William C. Waller, Jr. and Denis H. Mark, Waller, Mark & Allen, P.C., Denver, Colo., were on the brief for defendant-appellee William A. Kilpatrick).

Robert G. Morvillo, Obermaier, Morvillo & Abramowitz, New York City (Robert J. Anello, was on the brief) for defendant-appellee The Bank of Nova Scotia.

Robert D. Grossman, Jr., Grossman and Flask, Washington, D.C. (James L. Treece, Treece, Bahr & Arkey, Littleton, Colo., was on the brief), for defendant-appellee Declan J. O'Donnell.

Shelia C. Lerner, pro se.

Donald E. Van Koughnet, Naples, Fla., for defendants-appellees Michael L. Alberga and Casey S. Gill.

Before HOLLOWAY, Chief Judge, SEYMOUR, Circuit Judge, and BOHANON, District Judge*.

HOLLOWAY, Chief Judge.

After a twenty month investigation conducted before two grand juries, this case began with the return of a twenty-seven count indictment charging all defendants-appellants with conspiracy, and charging several of the defendants additionally with mail fraud and/or tax fraud.[1] Defendant Kilpatrick was charged in Count XXVII with obstruction of justice.

Initially the district court dismissed the first twenty-six counts of the indictment as improperly pleaded and for failure to charge a crime by failing to allege a lack of economic substance in the underlying transactions. *United States v. Kilpatrick*, 594 F.Supp. 1324, 1327 (D.Colo.1984). Following a separate motion by the Bank of Nova Scotia (Bank), the district court dismissed the counts in which the Bank was named for failure to al-

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* The Honorable Luther L. Bohanon, United States District Judge of the Eastern, Northern and Western Districts of Oklahoma, sitting by designation.

[1] The Bank of Nova Scotia was charged in ten counts with conspiracy to defraud the United States (18 U.S.C. § 371) (Count 1) and aiding and abetting a mail fraud (18 U.S.C. §§ 1341, 2) (Counts 13-21).

lege the requisite knowledge and intent by the Bank to commit the crimes charged. *Id.* The Government appealed all these dismissals in Nos. 83-1363 through 83-1369.

Before argument here, as requested we partially remanded the case to the district court to determine whether misconduct on the part of Government attorneys in connection with the grand jury investigation and presentation constituted additional grounds for dismissal. Following the partial remand, Judge Winner issued an opinion which, among other things, summarized the status of the cases which were reassigned to Judge Kane, granted a new trial on the obstruction of justice count against Kilpatrick, and ordered disclosure of the grand jury transcript. *See United States v. Kilpatrick*, 575 F.Supp. 325 (D.Colo.1983).

After ten days of hearings Judge Kane dismissed all twenty-seven counts of the indictment because of prosecutorial misconduct.[2] The Government also appealed these dismissals in Nos. 84-2481 through 84-2487. With the latter appeals we consolidated Nos. 83-1363 through 83-1369, discussed above. In this opinion we dispose of the issues raised in appeals Nos. 83-1363 through 83-1369 and Nos. 84-2481 through 84-2487. Our separate opinion to follow will address the issues raised in No. 83-2284, the Government's appeal from the order for a new trial for Kilpatrick challenging adverse publicity concerning Government counsel, and No. 84-1231, a mandamus proceeding also complaining of adverse publicity concerning Government counsel.

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[2] The district court's first dismissal left standing Count XXVII of the indictment which charged the defendant Kilpatrick with obstructing the grand jury investigation of the tax shelters. After a jury trial the defendant Kilpatrick was found guilty of obstruction of justice. *See United States v. Kilpatrick*, 575 F.Supp. 325, 326 (D.Colo. 1983). However, the defendant Kilpatrick moved for a new trial, which Judge Winner granted. *See id.* at 342.

We conclude that we must reverse the dismissals by the district court and order reinstatement of all counts of the indictment.

I

Sufficiency of the indictment

A

The Government appeals the order dismissing the first twenty-six counts of the twenty-seven count indictment, Nos. 83-1363 through 83-1369. (I R. 274). The indictment was based on two alleged fraudulent investment enterprises sold to investor-taxpayers in the United States. The district court dismissed the first twenty-six counts because of their failure to allege the lack of economic substance in the transactions underlying the tax shelter program, and because of the court's concern that the defendants would not be able to plead a conviction or acquittal as a bar to subsequent prosecution. (IV R. 3-4). Furthermore, the ten counts naming the Bank were dismissed as to the Bank on the additional ground that the indictment failed to allege that the Bank or its representatives had the requisite knowledge or intent to commit the crimes charged. (IV R. 7-11).

Count I, which related to the structured coal programs in the United States, charged five of the individual defendants and the Bank with "unlawfully, willfully, and knowingly conspir[ing] . . . to defraud the United States of America by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment and collection of the revenue through false and fictitious claims of deductions for advance royalty 'payments' . . ." in violation of 18 U.S.C. § 371. (I R. 1-2). The crux of the conspiracy charged in Count I was the creation in mineral leases of false tax deductions for nonexistant advance royalty payments for investor-taxpayers. The charging paragraph

of Count I is followed by an extensive listing of "Means And Methods" and sixty-four overt acts.

Count II, which concerned the funding of the research and development of methanol conversion processes, charged five of the individual defendants with a conspiracy similar to the conspiracy alleged in Count I in violation of 18 U.S.C. § 371. The crux of the conspiracy charged in Count II was the creation of false tax deductions on nonexistant research and development payments resulting from investments in limited partnerships formed to fund research and development of methanol conversion processes.

Counts III through X charged various defendants under 26 U.S.C. § 7206(2) with aiding and assisting in the preparation and presentation of false partnership and individual tax returns because of representations made to various taxpayers that the taxpayers were entitled to claim deductions for royalty payments (Counts III through VI), or research and development payments (Counts VII through X), when no such deductions were allegedly permissible. Counts XI and XII charged defendants Kilpatrick and O'Donnell with willfully making and subscribing false individual tax returns in violation of 26 U.S.C. § 7206(1). Counts XIII through XXVI charged various defendants with substantive mail fraud violations under 18 U.S.C. § 1341, based on their alleged defrauding of investors in connection with the programs alleged in Counts I and II.

After extensive briefing and hearings, the district court dismissed Counts I and II. First, the court dismissed the two counts for failure to allege lack of economic substance of the underlying enterprises. Such justification must necessarily rest on the view that such lack of economic substance is an essential element of a § 371 crime in these circumstances. Second, the court dismissed the two counts because of its concern that the

defendants would not be able to plead a bar to any subsequent prosecution. The parties stipulated that the programs which formed the basis of Counts I and II also served as the foundation of the fraud alleged in Counts III through XXVI. (I R. 274-75). The court thus dismissed those counts. (*Id.*) Moreover, the court dismissed as to the Bank, finding that knowledge and intent on the Bank's part was not sufficiently alleged.

B

An indictment is sufficient if it (1) contains the essential elements of the offense intended to be charged, (2) sufficiently apprises the accused of what he must be prepared to defend against, and (3) enables the accused to plead a judgment under the indictment as a bar to any subsequent prosecution for the same offense. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1046-47, 8 L.Ed.2d 240 (1962); *see also United States v. Salazar*, 720 F.2d 1482, 1486 (10th Cir. 1983), *cert. denied*, 469 U.S. 1110, 105 S.Ct. 789, 83 L.Ed.2d 783 (1985).

> The test is not whether the indictment could have been made more definite and certain. Rather, before a conviction, the indictment standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense. And, after a conviction, the entire record of the case must be sufficient so as to enable the accused to subsequently avail himself of the plea of former jeopardy if the need to do so should ever arise.

Clay v. United States, 326 F.2d 196, 198 (10th Cir. 1963), *cert. denied*, 377 U.S. 1000, 84 S.Ct. 1930, 12 L.Ed.2d 1050 (1964) (footnote omitted); *see also* 1 C. Wright, Federal Practice and Procedure § 125, at 364-65 (2d ed. 1982).

We hold that the indictment is sufficiently precise to meet the requirements of the Constitution and Rule 7(c) of the Federal Rules of Criminal Procedure.[3] We agree with the district court that the basis of Counts I and II also served as the foundation of the fraud alleged in Counts III through XXVI. Consideration of the first two counts alone was urged in the briefs submitted. Therefore, we direct our attention primarily to Counts I and II. *Accord United States v. Arge*, 418 F.2d 721, 723 (10th Cir. 1969).

C

Essential elements of the offense charged

The court should dismiss an indictment if it does not "contain[] the elements of the offense intended to be charged." *Russell*, 369 U.S. at 763, 82 S.Ct. at 1047. All the defendants contend, and the district court agreed, that the failure to allege the lack of economic substance of the underlying programs rendered the indictment fatally defective. We disagree.

Count I charges all the individual defendants and the Bank with defrauding the United States of America "through false and ficticious claims of deductions for advance royalty 'payments'. . . ." (I R. 2). We believe the allegation in Count I of "false and ficticious claims of deductions" is sufficient when read in light of the entire Count. It is true that indictments under the broad language of the general conspiracy statute "must be scrutinized carefully as to each of the charged defendants

[3] The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . ." (Rule 7(c)(1) provides in part:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

"because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable." *Dennis v. United States*, 384 U.S. 855, 860, 86 S.Ct. 1840, 1843, 16 L.Ed.2d 973 (1966) (citations omitted). However the indictment should be read as a whole and interpreted in a commonsense manner. *See United States v. Hajecate*, 683 F.2d 894, 898 (5th Cir. 1982), *cert. denied*, 461 U.S. 927, 103 S.Ct. 2086, 77 L.Ed.2d 298 (1983); *see also* 8 J. Moore, Moore's Federal Practice ¶ 7.04, at 7-20 (2d ed. 1985). Count I charges that five of the individual defendants and the Bank conspired to defraud the United States (unlawful objective) by false and ficticious claims of deductions (the means). *Accord Schino v. United States*, 209 F.2d 67, 69 (9th Cir. 1953), *cert. denied*, 347 U.S. 937, 74 S.Ct. 627, 98 L.Ed. 1087 (1954).

Count II charges five of the individual defendants with the same conspiracy but as to research and development payments. It states the gist of the offense of conspiracy and adequately lays out the grand jury's charges and the general factual circumstances underlying them. The fact that the defendants contest the substance of the offense charged does not render the indictment insufficient. *See United States v. Crooks*, 804 F.2d 1441, 1450 (9th Cir. 1986). We do not feel that a lack of economic substance allegation is required in an indictment already alleging that the defendants conspired to defraud the United States through *false* and *ficticious* claims of deductions for research and development payments.[4]

[4] The defendants cite a number of cases which consider the economic substance of a given transaction to be pivotal to the outcome of the case. *E.g.*, *Frank Lyon Co. v. United States*, 435 U.S. 561, 573, 577, 98 S.Ct. 1291, 1298, 1300, 55 L.Ed.2d 550 (1978); *see also United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985); *United States v. Carruth*, 699 F.2d 1017, 1021-22 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038, 104 S.Ct. 698, 79 L.Ed.2d 164 (1984); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 89, 94 (2d Cir.), *cert. denied*, 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366

The Bank further contends that Count I fails to allege the requisite knowledge and intent on its part, which it says is necessary to state an offense under 18 U.S.C. § 371. It points to "key charging" paragraphs which list various individual defendants, but which do not name the Bank.

It is axiomatic that "all the material facts and circumstances embraced in the definition of the offence must be stated, or the indictment will be defective." *United States v. Hess*, 124 U.S. 483, 486, 8 S.Ct. 571, 573, 31 L.Ed 516 (1888). Moreover, a court cannot by implication add an essential element to the indictment. "[A defendant] cannot be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury." *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979) (citations omitted). Courts, however, do not insist that any particular word or phrase be used in stating an essential element. *See United States v. Garcia-Geronimo*, 663 F.2d 738, 742 (7th Cir. 1981). The requisite mental element for a § 371 offense must be alleged in the indictment. *See United States v. Stevens*, 612 F.2d 1226, 1230 (10th Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980).

(1983). They do not, however, address the sufficiency of an indictment, nor do they provide principles helpful here. The sufficiency of an indictment on a motion to dismiss is tested by its allegations. Fed. R. Crim. P. 12(b)(2). The points defendants argue are to be tested at trial. *See United States v. Knox*, 396 U.S. 77, 83 n.7, 90 S.Ct. 363, 367 n.7, 24 L.Ed.2d 275 (1969); *cf. Crooks*, 804 F.2d at 1448.

We do not feel that the holdings in *Frank Lyon* or the other cases show a fatal defect in the indictment here for want of an allegation of lack of economic substance to the underlying transactions. The indictment *does* charge a lack of resources to make payments and loans, fictitious transactions, and check kites and check swaps used therefor, in the Count I and II statements of "Means and Methods." The indictment is thus sufficient as a statement of the offenses charged.

The charging paragraph in Count I uses the phrase "unlawfully, willfully, and knowingly conspire . . . to defraud the United States of America . . . in the ascertainment, computation, assessment and collection of the revenue. . . ." (I R. 1-2). Moreover, the allegations in Count I go further to charge the requisite knowledge and intent. Under the "Means and Method" portion of Count I the indictment alleges that the Bank, along with other named defendants, "devised and/or participated in a scheme to make it appear that the required payments had, in fact, been made. . . " (*Id.* at 6). It is further charged that the Bank "agreed to further conceal the fact that the purported payments by P & J Coal Company could not be made and that the basis of the 1978 funding was nothing more than a 'check kite' and/or 'check swap.'" (*Id.* at 7). It is further charged that the Bank "knew that this type of 'check kite' was ficticious, and was conducted to create checks to make it appear that P & J Coal Company had made its required loans." (*Id.* at 8). It is also alleged that the Bank "knew that P & J Coal Company had not in actuality made its payments as required and that the transaction was a fiction designed to create the illusion that P & J Coal Company had made payments to investors. . . ." (*Id.* at 9). Furthermore, it is stated that the Bank conspired with the named defendants to have "the records of and pertaining to Marlborough Investments, Ltd., as well as other entities, . . . moved, altered and/or destroyed." (*Id.*).

Both the initial charging paragraph and the several "Means and Methods" paragraphs aver the requisite knowledge or intent on the part of the Bank. Whether the exact term used is "knowledge" or "devised" or "agreed to conceal" is not relevant; "[t]here is no magic to the words used . . . to allege guilty knowledge." *Davis v. United States*, 347 F.2d 378, 379 (10th Cir. 1965) (per curiam). Moreover, "[w]hen the same mental element is required for each act . . . an initial recital of

the element is sufficient." *Stevens*, 612 F.2d at 1230. Count I depicts the Bank as an active participant in a conspiracy to defraud the IRS in its assessment and collection of income taxes. The essence of Count I is the alleged concerted conduct on the part of all the defendants. Thus Count I adequately charges a conspiracy to defraud the United States, and with the required specificity alleges the culpable role of each of the defendants. *Dennis*, 384 U.S. at 860, 86 S.Ct. at 1843; *see also United States v. Turkish*, 623 F.2d 769, 771 (2nd Cir. 1980), *cert. denied*, 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981). And we conclude that the indictment sufficiently charged the requisite mental element on the part of the Bank.[5]

D

Notice of the charges

We must decide next whether the indictment was adequate to inform the defendants of the charges.

Allegations of the means and methods as well as the overt acts may be considered in judging the sufficiency of the conspiracy counts. *See United States v. Watson*, 594 F.2d 1330, 1341 (10th Cir.), *cert. denied*, 444 U.S. 840, 100 S.Ct. 78, 62 L.Ed.2d 51 (1979). Counts I and II set out the transactions purporting to be the grava-

[5] The Bank cites as supplemental authority *United States v. Golitschek*, 808 F.2d 195 (2d Cir. 1986), for the proposition that the omission of the Bank from the indictment's list of defendants with specific knowledge of the alleged violations of tax laws is fatal. *Golitschek* does not address the sufficiency of an indictment; rather, that case reviews the propriety of certain jury instructions concerning the defendant's knowledge as to the legality of planned shipments of helicopters from the United States to Iran. *Id.* at 197.

Moreover, in focusing exclusively on the omission the Bank fails to recognize one of the fundamental canons of construction in interpreting an indictment; that is, an indictment must be read as a whole and interpreted in a common-sense manner. Employing this canon, we are convinced that the indictment sufficiently charged the requisite mental element on the part of the Bank.

men of the conspiracy charges with specificity. Relevant names, dates, companies involved, and amounts of money are averred in detail. An extensive listing of "Means and Methods" and "Overt Acts" is made. Thus the indictment is replete with the particulars of the acts on which the two counts are predicated. It adequately charges the individual defendants and the Bank with definiteness, certainty, and with reasonable particularity as to time and place, naming persons or entities involved in the conspiracies. *See, e.g., Wong Tai v. United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 301, 71 L.Ed. 545 (1927).

E

Preclusion of double jeopardy

Finally we must consider whether the indictment is sufficient to adequately protect the defendants against double jeopardy.

In addressing this question we note that the defendants are permitted to use the entire record and the judgment, not merely the indictment, in asserting double jeopardy. *See Arge*, 418 F.2d at 725; *Clay*, 326 F.2d at 199; *see also* 1 C. Wright, *supra* at § 125, p. 365. We are not persuaded that the indictment fails to adequately protect the defendants. It lays out the necessary facts with specificity as to the relevant times, places, persons, and entities and the charges made against each defendant. Along with the entire record in this case, the indictment will provide adequate safeguards against double jeopardy.

II

Prosecutorial misconduct

A

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury. . . ." The grand jury is a "grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety. . . ." *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). The function of the grand jury "was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." *Hale v. Henkel*, 201 U.S. 43, 59, 26 S.Ct. 370, 373, 50 L.Ed. 652 (1906). A grand jury proceeding is not adversarial but *ex parte*. *See United States v. Calandra*, 414 U.S. 338, 343-44, 94 S.Ct. 613, 617-18, 38 L.Ed.2d 561 (1974). We are mindful of the oft-quoted words of Judge Learned Hand that "[s]ave for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination." *United States v. Remington*, 208 F.2d 567, 573 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 347 U.S. 913, 74 S.Ct. 476, 98 L.Ed. 1069 (1954).

The separation of powers doctrine mandates judicial respect for the independence of both the prosecutor and the grand jury. *See United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 3282, 91 L.Ed.2d 571 (1986); *United States v. McClintock*, 748 F.2d 1278, 1283 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 106 S.Ct. 75, 88 L.Ed.2d 61 (1985). Dismissals of indictments for prosecutorial misconduct are rarely upheld. *United States v. Anderson*, 778 F.2d 602, 606 (10th Cir. 1985); *United States v. Pino*, 708 F.2d 523, 530 (10th Cir. 1983); *see also United States v. Buchanan*, 787 F.2d 477, 487 (10th Cir. 1986). Dismissal of an indictment for prosecutorial misconduct rests upon two distinct though closely related theories. A court may dismiss on the bases of the Fifth Amend-

ment Due Process or Grand Jury Clauses.[6] The constitutional concerns focus on the fairness to the defendant and on remedying any harm to his basic rights. *See McClintock*, 748 F.2d at 1284; *Pino*, 708 F.2d at 530-31.

A court may also dismiss an indictment by relying on its supervisory powers. *See Pino*, 708 F.2d at 530. The supervisory powers theory is premised on the federal courts' inherent ability to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). The supervisory powers theory focuses on deterring illegality and protecting judicial integrity. *See McClintock*, 748 F.2d at 1285 (citing *United States v. Payner*, 447 U.S. 727, 735 n. 8, 100 S.Ct. 2439, 2446, n. 8, 65 L.Ed.2d 468 (1980)). However, the common theme of the cases is that prosecutorial misconduct alone is not a valid reason to dismiss an indictment. "An indictment may be dismissed for prosecutorial misconduct which is flagrant to the point that there is *some significant infringement on the grand jury's ability to exercise independent judgment.*" *Pino*, 708 F.2d at 530 (emphasis added); *see also United States v. Page*, 808 F.2d 723, 726-27 (10th Cir. 1987).

Since briefing and argument we now have the Supreme Court's opinion in *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), for which we abated these appeals, and supplemental briefs thereon and our opinion in *United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986). In *Mechanik*, the defend-

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[6] We have pointed out that dismissal has been based on the Fifth Amendment Due Process Clause or on the court's supervisory power. *Pino*, 708 F.2d at 530, and cases there cited. The Ninth Circuit has cited the Grand Jury Clause as a constitutional ground for dismissal. *See United States v. Sears, Roebuck and Co.*, 719 F.2d 1386, 1391 n.7 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079, 104 S.Ct. 1441, 79 L.Ed.2d 762 (1984).

ants moved before the verdict for dismissal of the indictment on the ground that the simultaneous presence and examination of two Government agents had violated Fed.R.Crim.P. 6(d) (*i.e.*, unauthorized presence before the grand jury). 475 U.S. at ——, 106 S.Ct. at 940. The district judge took the motion under advisement until the conclusion of the trial, when he denied it. *Id.* at ——-——, 106 S.Ct. at 940-42. The Fourth Circuit reversed in part, dismissing one count of the indictment using a *per se* dismissal rule. The Supreme Court reversed in part, holding that "[m]easured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Id.* at ——, 106 S.Ct. at 942 (footnote omitted). Moreover, the Court held:

> [H]owever diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation. In such a case, the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings.

Id. at ——, 106 S.Ct. at 943.

In *Taylor* we distinguished between technical errors like those addressed in *Mechanik* and errors which adversely threaten a defendant's right to fundamental fairness in the criminal process. The former category of error falls within the rule announced in *Mechanik*, while the later category of error is not rendered moot by a petit jury's determination of guilt. *See Taylor*, 798 F.2d at 1340.

In light of *Mechanik* and the analysis in our *Taylor* and *Pino* opinions, we conclude that consideration of dismissal of an indictment because of prosecutorial misconduct before a grand jury calls for weighing several factors. First, a reviewing court must determine whether the claimed errors should be characterized as technical or procedural and affecting only the probable cause charging decision by the grand jury, or whether the alleged errors should be characterized as threatening the defendant's right to fundamental fairness in the criminal process. If the errors can be characterized as procedural violations affecting only the probable cause charging decision by the grand jury, then the defendant must have successfully challenged the indictment before the petit jury rendered a guilty verdict. *Mechanik*, 475 U.S. at ——-——, 106 S.Ct. at 941-43. If, however, the errors can be characterized as threatening the defendant's rights to fundamental fairness as "go[ing] beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment, . . . ," a determination of guilt by a petit jury will not moot the issue. *Taylor*, 798 F.2d at 1340.

Second, it must be determined whether the prosecutor engaged in flagrant or egregious misconduct which significantly infringed on the grand jury's ability to exercise independent judgment. *Pino*, 708 F.2d at 530. Thus even assuming misconduct, a failure by the defendant to show a significant infringement on the ability of the grand jury to exercise its independent judgment in the charging decision will result in the denial of a motion to dismiss. "The relevant inquiry focuses on the impact of the prosecutor's misconduct on the grand jury's impartiality, not on the degree of the prosecutor's culpability." *De Rosa*, 783 F.2d at 1405 (citation omitted).[7]

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[7] The first consideration is necessitated by the Supreme Court's opinions in *Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986) and *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The second and third factors are proper because of the concerns highlighted in *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), where the Court held that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by

Here the district court dismissed the indictment as a whole, stating that the indictment was dismissed for numerous violations of Rule 6(d); that the indictment was dismissed because of numerous violations of Rule 6(e); that the indictment was *not* dismissed *solely* for use of "pocket immunity" in contravention of 18 U.S.C. §§ 6002 and 6003; that the indictment was *not* dismissed *solely* for violations of the Fifth Amendment; that the indictment was *not* dismissed *solely* for the knowing and deliberate presentation of misinformation to the grand jury; that the indictment was *not* dismissed *solely* for violations of the Sixth Amendment; and that the indictment was dismissed because of the totality of the circumstances, including the numerous violations of Rule 6(d) and (e), the violations of 18 U.S.C. §§ 6002 and 6003, the violations of the Fifth and Sixth Amendments, the knowing presentation of misinformation to the grand jury, and the mistreatment of witnesses. 594 F.Supp. at 1353.

In its separate dismissal for violations of Rule 6, the district court employed a *per se* rule of dismissal. However, in dismissing the indictment under the totality test, the court employed the standard explicated in *Pino*, 708 F.2d at 530. The Government contends that the district court's factual findings as well as the legal conclusions drawn were in error. Moreover, the Government alleges that the indictment was the product of an independent grand jury and thus valid. We agree substantially with the Government's argument and therefore must reverse.

B

The defendants-appellees vigorously argue that the appropriate standard of review for the district court's findings is the clearly erroneous standard, under which they contend that reversal is not warranted. Our review of

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the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Id.* at 363, 76 S.Ct. at 409 (footnote omitted).

whether the prosecutors engaged in specific flagrant or egregious misconduct before the grand jury involves questions of historical fact governed by the clearly erroneous standard. *Campbell v. United States*, 373 U.S. 487, 493, 83 S.Ct. 1356, 1360, 10 L.Ed.2d 501 (1963); *cf. Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Of course, such findings of historical fact are clearly erroneous only when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. at 573, 105 S.Ct. at 1511 (1985).

Here, however, the facts are essentially admitted or specifically found by the district court and the law is undisputed. In such instances the issue is whether the law applied to the facts satisfies the legal standard of conduct binding on the prosecutor. Although the question can be viewed as one going to an ultimate fact, *i.e.*, whether the independent judgment of the grand jury has been infringed, we nevertheless conclude that the issue primarily involves the consideration of legal principles, calling for *de novo* review by the appellate court. *See Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986); *cf. Chaney v. Brown*, 730 F.2d 1334, 1346 (10th Cir. 1984), *cert. denied*, 469 U.S. 1090, 105 S.Ct. 601, 83 L.Ed.2d 710 (1984) (holding that the issue whether withheld evidence might have affected guilt or punishment determination so that due process was denied is open for federal court review despite presumption of correctness of state court findings).

Accordingly, as to the trial court's critical rulings that the misconduct found tainted the grand jury indictment with its illegality, *see, e.g.*, 594 F.Supp. at 1349, that the abuses constituted systematic and pervasive overreaching, that the grand jury "was usurped and that time-honored constitutional principles were sullied," 594

F.Supp. at 1352, we review the rulings *de novo*, while we accept the underlying findings of historical fact, with some exceptions noted in this opinion. *See De Rosa*, 783 F.2d at 1404 ("We review *de novo* a district court's determination of whether a prosecutor's alleged misconduct before a grand jury warrants dismissal of the indictment.").

C

Rule 6(d) violations by unauthorized presence before the grand jury

The district court found that "the [IRS] agents made many joint appearances before the grand jury, without the presence of government counsel, and read transcripts to the jurors." 594 F.Supp. at 1330 (citations to record omitted). Finding the tandem reading of transcripts of proceedings before the first grand jury by the IRS agents to the second grand jury violative of Fed.R.Crim.P. 6(d), the district court found these violations to be one independent ground for dismissal of the indictment. 594 F.Supp. at 1344.

Rule 6(d) provides:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

We agree there was a violation of the rule. The record clearly shows that on several occasions IRS agents appeared before the grand jury jointly reading transcripts. (XIX R. 482-85; XX R. 633-34, 692-93, 709-11). The record also shows that the prosecutors at times

would leave the proceedings, allowing the agents to continue reading.[8]

Nevertheless, we disagree with the dismissal. We believe that *Mechanik*, which the district judge did not have before him, forecloses the use of a *per se* dismissal rule for violations of Rule 6:

> We cannot accept the Court of Appeals' view that a violation of Rule 6(d) requires automatic reversal of a subsequent conviction regardless of the lack of prejudice. Federal Rule of Criminal Procedure 52 (a) provides that errors not affecting substantial rights shall be disregarded. We see no reason not to apply this provision to 'errors, defects, irregularities or variances' occurring before a grand jury as we have applied it to such error occurring in the criminal trial itself. *See United States v. Hasting*, 461 U.S. 499, 509 [103 S.Ct. 1974, 1981, 76 L.Ed.2d 96] (1983); *Chapman v. California*, 386 U.S. 18, 21-24 [87 S.Ct. 824, 826-828, 17 L.Ed.2d 705] (1967); *United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986)].

Mechanik, 475 U.S. at ——, 106 S.Ct. at 942.[9]

While here the violations were called to the attention of the court before trial so that we do not have a verdict

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[8] The record further shows that one or possibly two of the agents were not placed under oath before reading the transcripts. (XIX R. 486-90; XX R. 709-11). Nevertheless, we do not believe the clarification of this issue is necessary to the resolution of this case.

[9] The defendants point out in their supplemental briefs that the Court in *Mechanik* expressed "no opinion as to what remedy may be appropriate for a violation of Rule 6(d) *that has affected the grand jury's charging decision* and is brought to the attention of the trial court before the commencement of trial." *Mechanik*, 475 U.S. at ——, 106 S.Ct. at 943 (emphasis added) (footnote omitted). We feel that this language did leave open a determination whether dismissal for such a violation, timely raised, may be justified if prejudice is shown affecting the charging decision.

of guilty to serve as a basis for holding that no prejudice in the charging decision occurred, we nevertheless are convinced that a *per se* rule of dismissal for Rule 6(d) violations as earlier applied in *United States v. Pignatiello*, 582 F.Supp. 251, 254-55 (D.Colo. 1984) (and cases cited therein), is no longer proper since *Mechanik*. We find no other circumstances showing that the violation of the Rule resulted in prejudice or infringement on the grand jury's independent functioning, as discussed below. Thus the dismissal for violations of Rule 6(d) without more cannot stand.

D

Rule 6(e) violations

The district court also found that the Government attorneys violated Fed.R.Crim.P. 6(e) by improperly disclosing and using grand jury materials, and by violating the rules of secrecy applicable to grand jurors, interpreters, stenographers, recording device operators, typists, Government attorneys, and persons to whom disclosure is made under Rule 6(e)(3)(A)(ii). 594 F.Supp. at 1331. The court held:

> [W]here violations of Rule 6(e) are intentional or reckless and systematic, the sanction of contempt is insufficient and dismissal of the indictment is warranted. Under such circumstances, it is not necessary for the defendant to show that he has been prejudiced by the violations. *In the instant case, however, such showing of prejudice has been convincingly made.*

Id. at 1348 (emphasis added).

Rule 6(e) implements the traditional policy of cloaking grand jury proceedings. *See United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425, 103 S.Ct. 3133, 3138, 77 L.Ed.2d 743 (1983). The Supreme Court noted several reasons for the policy of secrecy:

> First, if preindictment proceedings are made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 219, 99 S.Ct. 1667, 1673, 60 L.Ed.2d 156 (1979) (footnote omitted). Rule 6(e) operates as the measure of the privilege of access to grand jury materials.

The Government contends that dismissal of an indictment is not an appropriate remedy for a Rule 6(e) violation. In so arguing, the Government relies on the maxim "*expressio unius est exclusio alterius.*" The Rule provides "[a] knowing violation of Rule 6 may be punished as a contempt of court." Fed.R.Crim.P. 6(e)(2). The contempt language is permissive only. In the usual case Rule 6(e) can be enforced by a contempt citation. *See United States v. Malatesta*, 583 F.2d 748, 753 (5th Cir. 1978), *modified on other grounds*, 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979). Nevertheless, violations of Rule 6(e) may justify dismissal of the indictment where there has been an abuse of the grand jury process. *See United States v. Kabbaby*, 672 F.2d 857, 863 (11th Cir. 1982) (per curiam); *Malatesta*, 583 F.2d at 753. However, the focus of our inquiry must be on the integrity of the grand jury's process and independence,

rather than on the propriety of the Government's conduct. *See Kabbaby*, 672 F.2d at 863; *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).

Here the district court found reckless and systematic violations of Rule 6(e). Insofar as the court's opinion relied on such Rule 6(e) violations as a *per se* ground of dismissal, we again disagree. We hold that dismissal cannot be premised on such Rule 6(e) violations, *ipso facto*.

The court did find in addition that the violations caused prejudice, and we will treat that point in discussing the dismissal based on the totality of the circumstances.

E

The totality of misconduct before the grand jury

The district court concluded its opinion by stating:

> The indictment is dismissed because of the totality of the circumstances which include numerous violations of Rule 6(d) and (e), Fed.R.Crim.P., violations of 18 U.S.C. §§ 6002 and 6003, violations of the Fifth and Sixth Amendments to the United States Constitution, knowing presentation of misinformation to the grand jury and mistreatment of witnesses.

594 F.Supp. at 1353. The court employed the totality of the circumstances test of *Pino*, 708 F.2d at 530, to dismiss all twenty-seven counts of the indictment. The dismissal was premised on findings that Rule 6(d) and (e) were systematically violated; that IRS agents were sworn as "agents of the grand jury;" that summaries of evidence were misleading; that granting informal immunity was improper; that calling seven witnesses to appear solely to assert their Fifth Amendment privilege was improper; that a grand jury witness was mistreated; and that there were post-indictment violations of *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1064).[10]

We first consider whether the defendants challenged the indictment before the petit jury rendered a guilty verdict. It appears that all the named defendants successfully moved to dismiss the first twenty-six counts of the indictment before the commencement of the trial. The defendant Kilpatrick successfully moved to dismiss the twenty-seventh count (obstruction of justice) after the petit jury had rendered a guilty verdict. However, the district judge granted his motion for a new trial. Therefore, we will treat the defendant Kilpatrick's claim as to the twenty-seventh count along with that of the other defendants.[11] Thus we need not decide which errors affected only the probable cause determination of the grand jury and which errors implicated the defendants' rights to fundamental fairness. The rationale for foreclosing review recited in *Mechanik* is not applicable with respect to this issue.

We are not persuaded by the several reasons given for the dismissal. First, summaries of evidence given before

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[10] The district judge noted that the *Massiah* violations by definition occurred after the indictment was returned, and that defendants have demonstrated no prejudice from these violations; that the Bank's counsel had performed "ably and adequately throughout the litigation." He therefore concluded that dismissal of the indictment was an inappropriate remedy for the *Massiah* violations. 594 F.Supp. at 1351. Nevertheless the judge also said that the "*Massiah* violations must enter into my general qualitative assessments of the prosecutor's and grand jury's conduct." *Id.* He thus apparently weighed these violations as one element of the totality of the circumstances—one ground for dismissal of the indictment.

[11] We do not hold that every defendant can attack an indictment alleging errors affecting only the probable cause determination by the grand jury after they successfully move for a new trial. That issue is not now before us. However, the peculiar facts of this case permit us to consider Kilpatrick's claims without prejudice to any party.

the grand jury are permissible and often helpful, especially in complicated cases such as this. It must be remembered that this complicated tax fraud case spanned twenty months and involved two grand juries. Moreover, the district court is prohibited from looking behind the indictment to determine if it was based on inadequate or incompetent evidence. *Costello*, 350 U.S. at 363, 76 S.Ct. at 408; *see also United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972).[12] We cannot in these proceedings go into trial of the general issue, the insufficiency of proof, or the errors in the evidence before the grand jury.

Second, we have held that the use of "informal immunity," [13] which has been frequently upheld, is entirely proper. *See United States v. Anderson*, 778 F.2d 602, 606 (10th Cir. 1985) (and cases cited therein). Moreover, the defendants have failed to show how the use of informal immunity prejudiced the grand jury. *See, e.g., id.* at 606.

Third, the district court's findings of post-indictment violations of *Massiah* could not possibly have affected the grand jury's charging decision. Thus the use of such violations to justify dismissal was incorrect.

The remaining findings have somewhat more force but are insufficient to warrant dismissal of the indictment. The district court found systematic violations of Rule 6(d), causing prejudice to the defendants. 594 F.Supp. at 1353. After review of the district court opinions, the records of the hearings, and the grand jury proceedings,

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[12] We note that no claim was made nor did the court find that the Government attorneys used perjured testimony, knowingly, or unknowingly, before the grand jury.

[13] "Informal immunity is contrasted with 'statutory immunity,' which by statute requires the approval of a Senior Justice Department Official and of the district court judge. *See* 18 U.S.C. §§ 6002, 6003." *United States v. Anderson*, 778 F.2d 602, 606 n.2 (10th Cir. 1985).

we are not persuaded that the defendants were prejudiced by the readings of prior grand jury testimony by IRS agents to the subsequent grand jury. We do not condone unsupervised readings by IRS agents unattended by Government attorneys; however, we are unable to find any evidence in the record of infringement on the grand jury's ability to exercise its independent judgment.[14]

The district court further found systematic violations of Rule 6(e). The court found that the Government attorneys "relinquished to the IRS their responsibility to determine the persons to whom disclosure would be made." 594 F.Supp. at 1345. The court also found that the IRS agents manipulated the grand jury to obtain materials to be used for civil litigation. *Id.* We do not find support for these findings.

The district court points to the extensive disclosure of grand jury materials to IRS civil employees as well as the haphazard and *post hoc* method of identifying those to whom disclosure was made as probative of Rule 6(e) violations. 594 F.Supp. at 1343-44. The court also cites as grounds for dismissal the "serious possibility" that IRS representatives improperly manipulated the grand jury to obtain materials for civil litigation purposes; the judge later found that the record "confirms that the grand jury's extraordinary powers and resources were, in part, initiated and channeled for just such a purpose." *Id.* at 1332 (footnote omitted). The court found also that the prosecutors showed a disregard for the secrecy provisions of Rule 6(e); that grand jury information had been disclosed in violation of Rule 6(e); and that a prosecutor had improper motives when he imposed unauthorized secrecy obligations on grand jury witnesses.

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[14] We are unable to find an instance in the record which the IRS agents convened the grand jury sessions without Government attorneys being present. Thus, the district court's findings that the IRS agents may have convened the grand jury sessions is not supported by the record.

Rule 6(e)(3)(A)(ii) permits the Government attorney to make disclosure, without court order, of matters occurring before the grand jury to "such government personnel . . . as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Fed.R.Crim.P. 6(e)(3)(A)(ii). The defendants point to portions of the record showing that disclosure of grand jury information was made to unknown numbers of civil IRS personnel who indexed all the subpoenaed grand jury documents. The computer indexing was done at Lowry Air Force Base in Colorado, in Ogden, Utah, and in Dallas, Texas. As to the latter two sites, there were no employees shown on the Rule 6(e) disclosure list. Assuming that this allegation finds support in the record, we fail to see how the grand jury's independence was usurped in such a significant way as to amount to grand jury abuse. *See Pino*, 708 F.2d at 530.

Further, we do not see how the preparation of a catch-all disclosure list significantly infringed the grand jury's independence. We note that the investigation lasted twenty months and involved the efforts of two grand juries. Moreover, the grand juries were presented with a complex tax fraud case. The aid of IRS experts was essential to a complete understanding of the case. The fact that some of the IRS personnel assigned to the grand jury investigation were from the civil division is by itself not sufficient to show grand jury abuse. There is nothing in Rule 6 to keep the Department of Justice from having IRS civil agents assigned to a grand jury investigation. *See Sells Engineering*, 463 U.S. at 428, 103 S.Ct. at 3140; *see also Coson v. United States*, 533 F.2d 1119, 1121 (9th Cir. 1976) (per curiam).

Federal employees assisting the prosecutor in the investigation and prosecution of federal criminal violations are permitted access to grand jury materials without

prior court permission. However, such support personnel may not use the materials except for purposes of assisting Government attorneys to enforce federal criminal laws. *Sells Engineering*, 463 U.S. at 428, 442, 103 S.Ct. at 3140, 3147; *see also* 8 J. Moore, *supra* at ¶ 6.05.[4][a], at 6-119.[15] The Rule 6(e) proscription is on the use of the grand jury material and not on who obtains it. *Sells Engineering*, 463 U.S. at 428, 103 S.Ct. at 3140; *see United States v. Baggot*, 463 U.S. 476, 480, 103 S.Ct. 3164, 3167, 77 L.Ed.2d 785 (1983). Furthermore, the fact that the grand jury returned an extensive indictment is probative evidence that it was not abused to obtain evidence for civil purposes.[16]

The court further found that fifteen letters prepared by the Government and mailed to the defendants' business associates identifying the subject and the targets of the investigation violated the secrecy obligations of Rule 6(e) and should lead to dismissal of the indictment. 594 F.Supp. at 1334-35. We fail to see how such a violation of Rule 6(e) should result in dismissal of the indictment. There is no support for a finding that the grand jury's independent judgment was infringed in any significant way. Moreover, the investigation by the IRS agents of numerous investors in the transactions in question here was proper even though the IRS agents limited the scope of the interviews by revealing the subject mat-

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[15] *United States v. Doe*, —— U.S. ——, ——, ——, 107 S.Ct. 1656, 1659, 1663, 95 L.Ed.2d 94 (1987), illustrates permissible limited use, on a showing of particularized need, by disclosure to Government civil attorneys in the Department of Justice Civil Division and a United States Attorney's Office, of grand jury material for purposes of consultation in deciding whether civil actions should be initiated.

[16] Whether grand jury records can be used as evidence in future civil litigation can be properly decided on a timely motion to suppress in such a case. *See Witte v. United States (In re Grand Jury Subpoena of Fred R. Witte Center Glass No. 3)*, 544 F.2d 1026, 1029 (9th Cir. 1976).

ter of the inquiry. Any misconduct was not so flagrant that the grand jury's independence was infringed.

Finally, we agree with the district court's finding that the prosecutor imposed unauthorized secrecy obligations on two witnesses before the grand jury. *Id.* at 1335-36. Although the admonition to the witnesses was contrary to the dictates of Rule 6(e)(2), no prejudice was shown in connection with the admonition, *see United States v. Radetsky*, 535 F.2d 556, 569 (10th Cir.), *cert. denied*, 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976), and the admonition cannot serve as a basis for dismissal of the indictment.

The district court found that the use of the title "agents of the grand jury" by IRS agents mislead the grand jury.[17] However, "Fed.R.Crim.P. 6 contemplates the use of government agents, such I.R.S. agents, to assist an attorney for the government in his handling of a grand jury investigation." *Anderson*, 778 F.2d at 605. We need not decide here whether the use of "grand jury agents" violated the Rule 6 prohibition against unauthorized presence or unauthorized disclosure.[18] There is no showing by the defendants as to how this record reveals

[17] At the beginning of work of the indicting grand jury on July 8, 1981, the prosecutor asked for Mr. Raybin to be sworn in as a Grand Jury agent, saying this meant it was "very, very clear" that when the agent looked at evidence it was not so much as an IRS agent but as the Grand Jury's agent. The oath administered at that time also referred to secrecy to be maintained concerning the evidence, subject to instructions by the Foreman or a federal judge. (G.J. Tr., Colloquoy, July 8, 1981, 9:11 A.M., at 2-3). Agent Mendrop was given a similar oath. (G.J. Tr., Colloquoy, July 8, 1981, 12:14 P.M., at 2).

[18] *Compare United States v. Jones*, 766 F.2d 994, 1001 (6th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985) ("agent of grand jury" sworn by foreman at prosecutor's request not prosecutorial misconduct) *with United States v. Claiborne*, 765 F.2d 784, 794 (9th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1636, 90 L.Ed.2d 182 (1986) (use of "grand jury agents" not proper).

any actual prejudice to them in the proceedings by overreaching the grand jury or usurping its independence through this conduct.

Moreover, we do not see how the invocation of Fifth Amendment rights by grand jury witnesses should lead to dismissal of the indictment. The record shows that once the privilege was invoked the Government attorneys ceased questioning. *See United States v. Thibadeau*, 671 F.2d 75, 78 (2d Cir. 1982). "[T]he privilege accorded one called before a grand jury is the election to refuse to give testimony which might tend to show he had committed a crime. It is not designed to effect a prohibition against inquiry by an investigative body." *United States v. Cefalu*, 338 F.2d 582, 584 (7th Cir. 1964). The fact that several witnesses planned to invoke their Fifth Amendment privilege if called before the grand jury cannot be transformed into a prohibition against inquiry. Once the privilege was invoked on the record, the prosecutors discontinued all questioning.[19]

Finally, the district court found that the prosecutor's mistreatment of a witness favorable to the defense prejudiced the defendants. 594 F.Supp. at 1343. We find the mistreatment of the witness, an expert on tax matters, unjustifiable. The mistreatment occurred during a recess but within the hearing of several grand jurors, witnesses, and attorneys. The district court's opinion, however, focuses entirely on the conduct of the prosecutor and not on any resulting prejudice to the defendants. We conclude that the defendants have failed to show how the grand jury's independence was breached. The defendants are hard put to argue that this incident

[19] During the grand jury investigation, one juror indicated that the grand jury might consider the fact that a witness asserted the Fifth Amendment privilege against self-incrimination. (G.J. Tr., Colloquoy, May 3, 1982, 9:15 A.M., at 7.) A prosecutor promptly cautioned the grand jury that it was not to consider the assertion of the privilege.

in the course of a twenty-month investigation threatened the grand jury's indcpendence. *See Pino*, 708 F.2d at 530.

There is a presumption of regularity that attaches to grand jury proceedings. *Hamling v. United States*, 418 U.S. 87, 139 n. 23, 94 S.Ct. 2887, 2918 n. 23, 41 L.Ed.2d 590 (1974). Here the defendants failed to sustain their burden of overcoming the presumption. The grand jury transcripts show an active, independent, and questioning grand jury, familiar with the record, one that thoughtfully questioned, rather than submitted to statements and suggestions of the Government attorneys.[20] The district

[20] It is evident from the grand jury transcripts that the prosecutors frequently reminded the grand jury of its independence and duty to make its own assessment of the evidence introduced before it. A prosecutor specifically advised the grand jury that "these men are entitled to a fair and impartial deliberation by the Grand Jury." (G.J. Tr., Colloquy, Aug. 5, 1981, 4:11 P.M., at 4). The prosecutor further stated to the grand jury:

> Once again, at any time you have a question, by all means, either ask me or ask my agents. I'll try to clarify it. Like I told you the first day, don't be satisfied with what we tell you. Push us. Make sure that the documents are there and the evidence is there and the testimony is there. If you don't think it is there, tell me and if I can't get it better to you, to your satisfaction, then I'm failing my duty.

(G.J. Tr., Colloquy, Sept. 9, 1981, 10:15 A.M., at 2).

Furthermore, just before the prosecutors asked the grand jury to return an indictment they reiterated the roles of the Executive Branch and the grand jury:

> Mr. Blondin and I are advocates, and we are paid advocates. Thus, you should remember that Mr. Blondin and I are just that: advocates. And what we have said to you in the past and will say to you today is that of an advocate, and you should consider what we say only in the light of what we say makes sense: is it logical? is it rational? is it based on evidence? If it is, then you should consider the argument; if you reject it and find it is weak at some point, then reject it.

(G.J. Tr., Colloquy, Sept. 30, 1982, 9:07 A.M., at 5).

The grand jury transcripts portray an active and questioning grand jury. During the investigation the grand jury vigorously

court erred in focusing primarily on the propriety of the Government's conduct rather than on possible interference with the integrity and independence of the grand jury. "Dismissal of an indictment returned after deliberation by a grand jury is a very drastic action." *Anderson*, 778 F.2d at 606. It can only be warranted when the misconduct complained of significantly infringes "on the grand jury's ability to exercise independent judgment." *Pino*, 708 F.2d at 530.

We conclude that the totality of conduct before the grand jury did not warrant dismissal of the indictment. The accumulation of misconduct by the Government attorneys did not significantly infringe "on the grand jury's ability to exercise independent judgment." *Pino*, 708 F.2d at 530. Accordingly we hold that the district court erred in its conclusions that the grand jury's function was usurped and that the indictment was tainted with illegality, 594 F.Supp. at 1349, 1352, following the *de novo* review we feel we should conduct. *See* Part II-B, *supra*. We are also persuaded that if those determinations are ultimate fact-findings, they are clearly erroneous in light of the record.[21]

questioned the prosecutors (*see, e.g.*, G.J. Tr., Colloquy, July 8, 1981, 8:39 A.M., at 9, 12, 13, 17; G.J. Tr., Colloquy, Aug. 5, 1981, 4:11 P.M., at 2-4) and the IRS agents (*see, e.g.*, G.J. Tr., Raybin, July 8, 1981, 9:11 A.M., at 13-14, 16-23, 33; G.J. Tr., Mendrop, Aug. 5, 1981, 4:04 P.M., at 3-7; G.J. Tr., Mendrop, Sept. 29, 1982, 9:32 A.M., at 14-15, 20-22, 25, 43-44, 47-49, 54; G.J. Tr., Raybin, Sept. 29, 1982, 2:32 P.M., at 20-21). Moreover, one juror questioned whether the evidence presented was sufficient to charge one of the defendants, the secretary Ms. Lerner, and vigorously interrogated the prosecutor on that point. (G.J. Tr., Sept. 29, 1982, 8:52 A.M., at 5-11).

[21] We have earlier explained our reasons for concluding that no showing justifying dismissal of the indictment was made in connection with the calling of witnesses who asserted their protection against self-incrimination. We quote below the colloquoy

As stated, we conclude that the accumulation of misconduct by the Government attorneys did not significantly infringe on the grand jury's ability to exercise

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cited by the dissent which shows the discussion and some reasons for calling the witnesses:

JUROR: I want to ask you a question. I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do.

MR. BLONDIN: Strike that out of your mind. You cannot assume—

JUROR: Can you speculate on why he wouldn't answer for us?

MR. BLONDIN: There are various reasons, and I can't speculate for you.

He has a right, especially since he is a target of the investigation, the right not to answer any questions a truthful answer to which may tend to incriminate him.

Now, I cannot speculate nor can the Grand Jurors, anybody in the room, speculate as to the reason why. You, as well as Mr. Pettingill, have that privilege; you can assert it for any reason: on advise of counsel, your own reasons, maybe your aunt or somebody else gave you advice on it. We are not going to speculate on it; and get rid of it, it has nothing whatsoever to do with your deliberations.

We cannot even begin to think of reasons for that. There could be some very legitimate reasons for him to assert the Fifth Amendmnet. Just the spector of a Grand Jury investigation—

JUROR: I'm sure that's easy for you and for us because we—

MR. BLONDIN: There are two options on what we can do when a witness takes the Fifth. All right, take it up—compel his testimony or her testimony, go to the Judge; the Judge says, "That's not privileged, you don't have a Fifth Amendment privilege, you testify. Give us answers."

At that point the witness says, "No, I am not going to testify." Then we go to court again, hold him in contempt; and it doesn't end there. There is an elaborate appellate procedure that we have to go through to get the issue resolved before we can get answers to questions that we propound before the Grand Jury.

The other option, we can give a witness immunity; and once he is granted immunity, we can compel him to testify, and he has no privilege.

Targets of the investigation, no immunity.

[Continued]

independent judgment. Without such infringement, the drastic remedy of dismissal of the indictment is unwarranted. We cannot agree that the remedy can be used without such a showing on the theory of exercise of supervisory powers, as the dissent concludes. Our decisions do not support such a view, and those of the Supreme Court have not established a different rule. In *Anderson* the opinion of Judge Kane is clear that his dismissal was based on an exercise of supervisory powers. 577 F.Supp. 223, 232-33 (D.Colo. 1983) ("It is well

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[21] [Continued]

JUROR: I got a question for you. You asked him who all had the right, I guess, to see these files; he pleaded the Fifth. How can that be incriminating to him?

MR. BLONDIN: There may be other people that have access to them, that we don't know about. He may not have known the answer and just took the Fifth. He, in this case, may have taken the Fifth on advise of counsel. That gets into speculation, and I can't. The questions I asked of him—and I was going to go in a more—go through it piece by piece, but I could see there is no way we could do that. All right. I tried to shortcut, just laid the foundation that these were business records, they were authentic business records that could be admissible.

The problem we had in the hearing before Judge Carrigan on the foreign corporations compelling production of those records was that there was objection made by defense counsel as to the admissibility of certain corporate records. We had subpoenaed Mr. O'Donnell and Mr. Kilpatrick, and we had asked their counsel to provide a custodian of records, somebody that could identify that these were business records.

They provided a witness that they assured us could identify the records, that would say they were corporate—a corporation does not have a Fifth Amendment privilege. All right. There are a number of Supreme Court cases that have resolved that issue, that a corporation has to provide a custodian to identify the records, and that's part of our foundation that the government or the prosecutor had to lay before the records could come in as evidence in a trial.

They objected to it. As a consequence of that we said, "All right, we are calling people in, and they are going to identify these business records." And that's why we have to go through this.

G.J. Tr., Colloquoy, Jan. 5, 1982, 8:09 A.M., at 22-25.

within a district court's supervisory powers to insure that the grand jury's integrity as an independent body is not destroyed in the public eye"), and the Judge concluded that the Government conduct there significantly impaired the grand jury's ability to exercise independent judgment. *Id.* at 234. We reversed, concluding that the grand jury's independence was not shown to have been infringed, citing *Pino*. *Anderson*, 778 F.2d at 604, 605, 606. Our *Pino* opinion, quoted by the dissent, is arguably unclear on the point. *Pino* does discuss the exercise of supervisory powers in a statement separate from that on infringement of the grand jury's judgment. However the full discussion in the opinion shows no holding that a dismissal is justified without "some significant infringement on the grand jury's ability to exercise independent judgment." *Pino*, 708 F.2d at 530 (citations omitted). That requirement is stated immediately following citations and a statement that "dismissal may be based on the Fifth Amendment Due Process Clause or upon the court's inherent supervisory powers." *Id.* In any event, *Anderson* makes clear the requirement of infringement of the grand jury's independence.

We do not read the Supreme Court's opinions as opening the door to dismissals on supervisory power notions without a showing of infringement on the grand jury's functions in cases like this. *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), relied on by the dissent, did say that it was unnecessary to reach the constitutional issue and reversed as an exercise of judicial supervision over the administration of criminal justice, "establishing and maintaining civilized standards of procedure and evidence." *Id.* at 340, 63 S.Ct. at 613. While this was the stated basis for the reversal, the opinion in no way suggests that such a ruling should be made without regard to the harmless error rule. *See* Fed.R.Crim.P. 52. *Young v. United States*, —— U.S. ——, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), also furnishes no basis for a conclusion that the Court favors an exercise of supervisory powers to dismiss indictments without regard for whether the grand jury's functions were infringed. The plurality opinion (Brennan, Marshall, Blackmun and Stevens, JJ.), held that society's interest in disinterested prosecution would not adequately be protected by harmless error analysis, but there was no majority opinion expressing that view in the circumstances of that case. Moreover *Young* involved special circumstances where appointment of private counsel, having professional obligations to his client, for prosecution of a criminal contempt proceeding raised special conflicts problems of an unusual nature.

We remain convinced that the drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories, cannot be exercised without a significant infringement on the grand jury's ability to exercise independent judgment.[22] We are instructed clearly in *United States v. Hasting*, 461 U.S. 499, 509, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983), to ignore errors that are harmless, including most constitutional violations.[23] Finally, *United States v. Russell*, 411 U.S.

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[22] *Accord United States v. De Rosa*, 783 F.2d 1401, 1406-07 (9th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 3282, 91 L.Ed.2d 571 (1986) (defendant must show prejudice before court will dismiss indictment on either the constitutional or supervisory grounds); *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985) (same); *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982) (same). *Contra United States v. Rosenfield*, 780 F.2d 10, 11 (3d Cir. 1985) (per curiam) *cert. denied*, —— U.S. ——, 106 S.Ct. 3294, 92 L.Ed.2d 709 (1986) (no prejudice required).

[23] The Court pointed out that deterrence is an inappropriate basis for reversal where an attenuated violation is involved "and where means more narrowly tailored to deter objectionable prosecutorial conduct are available." 461 U.S. at 506, 103 S.Ct. at 1979. And the Court referred specifically to such a less drastic remedy where a Government attorney made improper arguments to a grand jury. *Id.* at 506 n.5, 103 S.Ct. at 1979 n.5.

423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973), reversed a dismissal, cautioning against a "chancellor's foot" veto over law enforcement practices of which a court disapproves.

III.

The judgment of the district court dismissing the indictment is reversed and the cases are remanded with directions to reinstate all counts of the indictment.

SEYMOUR, Circuit Judge, dissenting.

I respectfully dissent from the view of the majority that prejudice to the defendant must be shown before a court can exercise its supervisory powers to dismiss an indictment on the basis of egregious prosecutorial misconduct. I would affirm.

It is beyond argument that the Government's conduct in this case was outrageous. As set out in two district court opinions, *United States v. Kilpatrick*, 594 F.Supp. 1324 (D.Colo. 1984), and *United States v. Kilpatrick*, 575 F.Supp. 325 (D.Colo. 1983), the record contains evidence constituting a laundry list of serious improprieties, most of which the majority neither disputes nor condones. Government officials repeatedly violated Fed.R.Crim.P. 6(d) by presenting two witnesses to the grand jury at the same time. *See* maj. op. at 1467-68, 1470. The Government routinely flouted the secrecy provisions of Fed. R.Crim.P. 6(e). First, it improperly used grand jury information in civil tax audits of taxpayers who invested in the tax shelters at issue, *see* maj. op. at 1471; second, it improperly disclosed the identity of the grand jury targets to people who were not grand jury witnesses but with whom the targets had business and professional relationships, *see id.* at 1472; and third, it improperly swore to secrecy two grand jury witnesses who had formerly represented the targets in S.E.C. proceedings involving the same tax shelters, *see id.* at 1472. During a

recess a Government attorney mistreated a tax expert, who had testified before the grand jury favorably to the targets, by shouting insults at and intimidating him in the presence of grand jurors, other witnesses, and attorneys.[1] *See id.* at 1472-73.

In addition, the Government attorney paraded seven witnesses before the grand jury knowing that they would invoke their Fifth Amendment privilege to refuse to answer any questions. I cannot agree with the majority's conclusion in footnote 19 that any prejudice arising from this presentation to the grand jury was eliminated by the prosecutor's admonition. The grand jurors had previously questioned the prosecutors on the use of the privilege, displayed frustration over its invocation, and discussed pursuing the matter with the district court to test the privilege. *See* rec., Remarks to grand jury, Jan. 5, 1982, at 22-29. Significantly, one grand juror stated: "I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do." *Id.* at 22. In view of this candid admission, the potential for prejudice arising from seven witnesses' refusal for fear of incrimination to discuss their involvement in the very matters upon which the grand jury was asked to indict cannot be denied. *Cf. United States v. Coppola*, 479 F.2d 1153, 1160 (10th Cir. 1973) (condemning conscious effort by Government to derive evidentiary value from adverse inference arising from invoking the privilege). Consequently, this court has held that it is improper for the Government to call a witness knowing that he will assert his Fifth Amendment privilege. *See id.*; *see also United States v. Crawford*, 707 F.2d 447, 449 (10th Cir. 1983).

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[1] The district court also found that the special agents who summarized the evidence against defendant Bank of Nova Scotia mischaracterized this evidence. *See Kilpatrick*, 594 F.Supp. at 1339-40. Although I agree with the majority that the agent's use of hearsay was not improper per se, *see* maj. op. at 1470, the majority does not address the serious allegation that the hearsay itself was inaccurate and misleading.

After numerous hearings before two trial judges, both judges found that the Government's pervasive misconduct evinced a deliberate and alarming disregard of standards imposed by the Federal Rules, Justice Department guidelines, ethical considerations, and civilized behavior.

> "The numerous abuses and violations of rules and constitutional principles must be considered particularly serious because of the admissions in these hearings that, for the most part, the activity was undertaken knowingly and purposefully."

Kilpatrick, 594 F.Supp. at 1352. Based on its finding that the Government's conduct was intentional, which includes credibility assessments this court may not lightly disregard, the district court found that "the substantial departures of prosecutors in this case from established notions of fairness, from clearly articulated rules of law, from specific rules of procedure and, indeed from the Department of Justice's own manual and operating directives constitute systematic and pervasive overreaching." *Id.* The court concluded that the cumulative effect of the Government's conduct prevented the grand jury from undertaking independent action. *Id.* at 1353.

Although acknowledging most of the improprieties set out in the lower court opinions, the majority does not agree with the district court that the Government's actions impaired the grand jury's ability to exercise its independent judgment, which is the standard that must be met before the indictment may be dismissed under the Fifth Amendment. Significantly, the majority also concludes that the sanction of dismissing the indictment is not a proper exercise of a district court's supervisory power unless the same standard is met, that is, unless there is a legally sufficient showing that the Government's misconduct adversely affected the grand jury's independence. Putting aside whether the impact of the Government prosecutors' behavior on the decision-making

process of this grand jury can realistically be evaluated, I do not believe that such a showing is a prerequisite to the pre-trial dismissal of an indictment under a court's supervisory power.

In *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), the Supreme Court did not employ a harmless error analysis in considering whether the invocation of its supervisory power was appropriate. To the contrary, the Court found it unnecessary to determine whether the defendants had been prejudiced by a constitutional violation before exercising its supervisory powers to reverse a conviction. In so doing, Justice Frankfurter said for the Court:

> "In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fudamental principles of liberty and justice; *Hebert v. Louisiana*, 272 U.S. 312, 316 [47 S.Ct. 103, 104, 71 L.Ed. 270 (1926)], which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

Id. at 340, 63 S.Ct. at 613.

In a recent consideration of supervisory powers, the Court set out the three purposes underlying their use: 1) to remedy the violation of recognized rights; 2) to

preserve the integrity of the judicial process; and 3) to deter illegal conduct. *See United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). The Court pointed out that securing these objectives by the exercise of supervisory power may frustrate the societal concern for the conservation of judicial resources and the prompt administration of justice embodied in the harmless error rule. *See id.* at 509, 103 S.Ct. at 1980. The Court held that a court contemplating the exercise of its supervisory power must weigh the benefits to be obtained against the cost to the countervailing interest in finality. *See id.* at 506-07, 103 S.Ct. at 1979. The weight to be given the harmlessness of the error obviously increases in significance when the balancing is done after trial and conviction.[2] Implicit in the Court's guidance on this issue is its recognition that although the harmlessness of the alleged misconduct is an element to be balanced against the desired result, it is *not* always dispositive. If the exercise of supervisory power were per se precluded by a finding of lack of prejudice, a balancing process would never be necessary.

Our opinion in *United States v. Pino*, 708 F.2d 523 (10th Cir. 1983), was filed only three days after *Hasting* and does not cite that decision. Moreover, I cannot agree with the majority's reading of *Pino* to establish that prosecutorial misconduct must be shown to have affected the grand jury's independence before supervisory power can be invoked, particularly in a pretrial setting. In *Pino*, the defendant contended that the prosecutor's behavior *had* unfairly infringed on the grand jury's independent judgment. The district court found no effect,

[2] Although *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), did not address the exercise of supervisory power, the Supreme Court's decision to reverse the automatic dismissal of an indictment for a Rule 6(d) violation was premised upon the importance the Court placed upon finality when an indictment is dismissed for a technical, harmless error *after* trial. *See id.* 106 S.Ct. at 942-43.

and the defendant appealed after his conviction. This court pointed out that dismissal of an indictment may be based either on the Fifth Amendment Due Process Clause or the court's inherent supervisory powers. *See id.* at 530. We distinguished between those two inquiries, however, stating:

> "We are not persuaded that the circumstances as a whole show such flagrant misconduct that the grand jury was overreached or deceived in some significant way, or that the prosecutor's conduct significantly infringed on the ability of the grand jury to exercise its independent judgment. *We are also not convinced that the circumstances here justify exercise of the court's supervisory power to protect the integrity of the judicial process by dismissing the indictment.*"

Id. at 531 (citation omitted) (emphasis added). Our separation of these distinct bases for dismissing an indictment indicates that *Pino* should not be read to hold that the finding of prejudice needed to support a dismissal on due process grounds is also required when supervisory powers are invoked.

Our subsequent cases citing *Pino* to require a showing of prejudice simply do not indicate which basis for dismissing the indictment was at issue. *See United States v. Page*, 808 F.2d 723, 726 (10th Cir. 1987); *United States v. Buchanan*, 787 F.2d 477, 487 (10th Cir. 1986); *United States v. Anderson*, 778 F.2d 602, 604-05, 606 (10th Cir. 1985).[3] It is also important to emphasize

[3] I cannot agree with the majority that our opinion in *Anderson* makes clear the requirement of prejudice. The district court opinion in *Anderson* refers to the denial of due process as a basis for its decision to dismiss the indictment, both by its own discussion of the constitutional function of the grand jury and by its references to the discussion of that constitutional function in *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-73, 35 L.Ed.2d 67 (1973). *See United States v. Anderson*, 577 F.Supp. 223, 230-32

that, contrary to the present case, *Hasting*, *Pino*, *Page*, and *Buchanan* are all cases in which the argument to dismiss the indictment was made after conviction, a time at which the interest in finality is very substantial and the harmlessness of the error is therefore weighted heavily.[4] Moreover, we said in *Page*:

> "This clearly is not a case involving abuse, bad faith, or vindictiveness. Instead the prosecutor's failure to correct Agent West's testimony was, at worst, an oversight. The extraordinary remedy of dismissal of the indictment is not called for here."

808 F.2d at 727.

In sum, I am convinced that neither the Supreme Court in *Hasting* nor our opinions in *Pino* and its progeny establish that a court is barred from exercising its supervisory powers to dismiss an indictment *prior to trial* absent a showing that the misconduct affected the grand jury's charging decision. Such a requirement would render a court's supervisory power superfluous because misconduct that does affect the grand jury's independence is a constitutional violation remediable under the Fifth Amendment.

The circuits are split on the need to show prejudice. *See United States v. Holloway*, 778 F.2d 653, 658-59 (11th Cir. 1985) (noting authority on both sides of issue), *cert. denied*, —— U.S. ——, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986). The Third Circuit has specifically rejected the prejudice requirement when there is "evidence that the challenged activity was something other

(D.Wyo. 1983). Our opinion in *Anderson*, which does not refer to the exercise of supervisory powers, concludes only that "the record in the instant case does not support the conclusions of the trial court which formed the basis for the dismissal." 778 F.2d at 606.

[4] Although in *Anderson* this court did reverse a dismissal granted prior to trial, we held that, contrary to the conclusion here, none of the challenged conduct was improper.

than an isolated incident unmotivated by sinister ends or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit." *United States v. Rosenfield*, 780 F.2d 10, 11 (3rd Cir. 1985) (per curiam) (quoting *United States v. Serubo*, 604 F.2d 807, 817 (3rd Cir. 1979), *cert. denied*, —— U.S. ——, 106 S.Ct. 3294, 92 L.Ed.2d 709 (1986). *Contra United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985); *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), *cert denied*, 459 U.S. 1038, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982). This standard comports with the Supreme Court's indication that a showing of prejudice is not required when the record reveals "a pattern of recurring violations." *United States v. Morrison*, 449 U.S. 361, 366 n. 2, 101 S.Ct. 665, 668 n. 2, 66 L.Ed.2d 564 (1981). Further, such a test is not inconsistent with *Hasting* and our circuit opinions, and is particularly appropriate when, as here, a dismissal is granted prior to trial.[5]

Although I recognize that supervisory powers should be exercised sparingly, I would apply the Third Circuit criteria in this case and uphold the district court's dismissal. After an evidentiary hearing, the district court here found that the ongoing misconduct, which pervaded the investigation of the case and its presentation to the grand jury, was motivated by bad faith and "improper strategic purpose[s]". *See, e.g., Kilpatrick*, 594 F.Supp. at 1335, 1338. The evidence clearly supports this credibility determination. The record of the Government's conduct evinces a determination to circumvent or simply ignore the standards governing grand jury proceedings when to do so would enhance the presentation of its case. Under these circumstances, the district court was within its discretion in exercising its supervisory power to pro-

[5] As the majority recognizes, Kilpatrick is in essentially the same position as a pretrial defendant because he was granted a new trial. *See* maj. op. at 1470.

tect the integrity of the judicial process and to deter illegal conduct, *see Hasting*, 461 U.S. at 505, 103 S.Ct. at 1978, particularly when the interest in finality had not been supported by a conviction.

Finally, it is important to point out that the exercise of supervisory power in this case does not violate the separation of powers by encroaching on the prosecutor's authority. A prosecutor may not invoke separation of powers to avoid the consequences of his intentional disregard of *judicial standards* specifically directed toward his conduct. The Supreme Court recently held that a court may exercise its supervisory authority to appoint a special prosecutor notwithstanding the argument that to do so would usurp the prosecutor's function. *See Young v. United States*, —— U.S. ——, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). "The exercise of supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the judiciary." *Id.* at ——-——, 107 S.Ct. at 2138. This holding is equally applicable when, as here, a court exercises its supervisory authority to enforce the Criminal Rules, which are also directly concerned with the functioning of the judicial process.

I conclude that a finding of prejudice to the defendant should not be required to dismiss an indictment when prosecutorial misconduct during the grand jury proceedings is pervasive. Prejudice to the integrity of the judicial process should be sufficient. Because the lower court's exercise of its supervisory power is supported by the facts and the law, I would affirm the dismissal of the indictment.

APPENDIX C

UNITED STATES DISTRICT COURT
D. COLORADO

Crim. No. 82-CR-222

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL, JOHN PETTINGILL, SHEILA C. LERNER, MICHAEL L. ALBERGA, C.S. GILL, C.M. SMITH, BANK OF NOVA SCOTIA,
Defendants.

Sept. 24, 1984

Charles Alexander, Trial Atty., U.S. Dept. of Justice, Tax Div., Washington, D.C., and Robert N. Miller, U.S. Atty., Linda S. Surbaugh, Asst. U.S. Atty., Denver, Colo., for U.S.A.

William C. Waller, Richard K. Rufner, Wagner & Waller, P.C., Englewood, Colo., for Kilpatrick.

James L. Treece, Littleton, Colo., for O'Donnell.

David L. Hiller, Duboskey & Hiller, Denver, Colo., for John Pettingill.

Thomas French, Dill, Dill & McAllister, Denver, Colo., for Lerner.

Donald E. Van Koughnet, Naples, Fla., for Alberga & Gill.

C.M. Smith, No Appearance.

James E. Nesland, Ireland, Stapleton & Pryor, Denver, Colo., and Robert J. Anello, Obermaier, Morvillo & Abramovitz, New York City, for Bank of Novia Scotia.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

KANE, District Judge.

PROCEDURAL BACKGROUND

After a twenty month investigation conducted before two successive grand juries, the instant proceeding was commenced on September 30, 1982 by the filing of a twenty-seven count indictment charging seven individuals and The Bank of Nova Scotia with conspiracy, mail fraud and tax fraud and also charging William A. Kilpatrick with obstruction of justice (Count 27). The bank was charged in ten counts with conspiracy to defraud (18 U.S.C. § 371) (Count 1) and aiding and abetting a mail fraud (18 U.S.C. § 1341 and § 2) (Counts 13 through 21).

On February 21, 1983, I dismissed the first twenty-six counts of the indictment for failure to charge a crime and as improperly pleaded. Additionally, upon separate motion by the bank, I dismissed the charges in which the bank was named upon the ground that the indictment failed to allege that the bank or any of its representatives had the requisite knowledge and intent to commit the crimes charged. The government appealed the dismissals.

On August 8, 1983, after briefing but before oral argument, the Tenth Circuit entered an order partially remanding the case to me so that all defendants could participate in hearings to determine whether prosecutorial misconduct and irregularities in the grand jury process constituted additional grounds for dismissal.

Before and immediately after the partial remand by the Tenth Circuit, the Honorable Fred M. Winner, Senior United States District Judge, presided over post-trial motions hearings following a guilty verdict against Mr. Kilpatrick on Count 27. On August 25, 1983, at about the time of his retirement from the bench, Judge Winner issued a memorandum decision which, among other things, summarized the status of the hearings which were being reassigned to me. Further, Judge Winner ordered that the government provide defendants with copies of transcripts of all proceedings that occurred before the grand juries. After some bizarre episodes of procedural novelty, Judge Winner's opinion was finally published. *See United States v. Kilpatrick*, 575 F.Supp. 325 (1983). The instant Findings of Fact, Conclusions of Law and Order must be read in conjunction with Judge Winner's opinion.

The government attorneys failed to provide defendants with complete transcriptions as ordered. They apparently overlooked, and did not transcribe, dozens of proceedings before the grand jury. The latter proceedings—which converted into hundreds of pages of transcript and, more significantly, disclosed clear violations of Rule 6—were not produced until the defense detected the lack of compliance with Judge Winner's order. Even now, the government remains unable to provide transcripts of all the proceedings and was unable to produce a single Rule 6(e) order (which government attorneys testified they obtained) authorizing several major disclosures of grand jury matters. The government asserts that it had turned over such transcripts as could be had as soon as they were received from the court reporter. Such, in my view, does not excuse the failure to produce completed and accurate transcripts. If the assertion minimizes the inference of dissimulation, it exacerbates stronger ones of confusion and indifference.

FACTS ESTABLISHED BY THE RECORD [1]

A. Grand Jury Agents

Despite detailed instruction from the impaneling court that the grand jury should maintain its independence and not develop into a "prosecutor's agent," shortly after both juries involved in the investigation leading to the instant indictment were sworn, the prosecutors created the office of "agent of the grand jury" for Messrs. Mendrop and Raybin, Special Agents assigned by the IRS to assist the prosecutors.[2] Several months later an IRS agent assigned to the civil division and who the prosecutors relied upon as an expert was also sworn in as an "agent of the grand jury." G.J. Tr. Schneider, May 3, 1982, 1:34 p.m., at pp. 2-3. The prosecutors divined the office of "grand jury agent" by personally administering oaths before the grand jury to Raybin, Mendrop and Schneider.[3] The government concedes that the prosecutors

[1] The facts relied upon in this opinion are taken from voluminous transcripts of hearings before two grand juries, Judge Winner, and me and a trial before a jury. To aid the reader, the following citation form is used: references to the trial to the jury presided over by Judge Winner are cited as "T. Tr."; references to hearings on the motion for a new trial or acquittal and the motion to dismiss before Judge Winner are cited as "W. Tr."; and references to hearings on the motions underlying this order are cited as "K. Tr." Citation of the grand jury transcripts are captioned "G.J. Tr." and recite the relevant witness or declarant, the date and the time of the transcription. Defense and prosecution exhibits submitted on this matter are designated respectively "DX" and "PX."

[2] The government seeks to absolve the prosecutors of any misconduct by pointing to instances where the prosecutors themselves informed the grand jury of its independent and unbiased mission. *See, e.g.*, G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:39 a.m. at pp. 9, 11; October 6, 1981, 10:58 a.m., at pp. 2, 3; September 29, 1982, 8:52 a.m., at p. 8. Such admonishments, however, are not curative of actions taken at other times which constitute abuses of the system and impinge upon the grand jury's integrity.

[3] Agent Raybin testified that before Mr. Snyder gave him his oath as an agent of the grand jury, he was also sworn in by the foreman of the grand jury. K.Tr. 267.

possessed no authority to administer such oaths. Indeed, the prosecutor who administers the oaths now concedes he created the oath and was "shooting from the hip" when he did so. K.Tr. 501.

The government argues that this event should be viewed as a technical mislabeling of no great import. It is, however, more than a misnomer.

First, the prosecutor's description to the grand jury of the role of a "grand jury agent" clearly misled the grand jury as to the appropriate role of the IRS agents in the proceedings. *See* Winner opinion, 575 F.Supp. at 329. As conceded by the prosecutor, there is simply no basis for his description to the grand jury of the role of grand jury agents.[4] K.Tr. 501.

Second, the grand jury was consistently reminded of the agents' uniquely created and described role and urged to rely upon the IRS special agents as their "agents." Thus, on many occasions when Raybin and Mendrop appeared as witnesses the government attorney reiterated that they were appearing as "agents of the grand jury." [5]

[4] Snyder did suggest that the swearing in of grand jury agents was practiced in Atlanta, Georgia and the Southern District of Florida. He did not, however, testify as to what grand jury agents did in these other districts or whether the practices employed elsewhere were similar to those used here. K.Tr. 414-15.

[5] On some occasions Mr. Snyder referred to Raybin and Mendrop as his agents. G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:30 a.m., at pp. 9, 15, 18, 21, 23; July 8, 1981, 12:05 p.m., at p. 5; August 5, 1981, 3:50 p.m., at p. 5; September 9, 1981, 8:37 a.m., at p. 2; September 9, 1981, 10:00 a.m., at p. 2; October 6, 1981, 10:58 a.m., at p. 12; May 3, 1982, 9:15 a.m., at p. 5. Such references did not, however, clarify the ambiguous role of the grand jury agents. As noted, the IRS agents were often referred to as agents of the grand jury. The confusion over the agents' role is discernible from isolated statements made by the prosecutors to the grand jury. Snyder, for example, said that he would, "have my agents, when I ask them to be sworn as agents of the Grand Jury,

See e.g., G.J. Tr. Mendrop, August 4, 1981, 9:25 a.m., at p. 2, August 5, 1981, 4:04 p.m., at p. 2, September 29, 1982, 9:32 a.m., at p. 2; G.J. Tr. Raybin, July 8, 1981, 9:11 a.m., at p. 5, March 3, 1982, 1:19 p.m., at p. 2, September 29, 1982, 2:32 p.m., at p. 2. Further, the government attorneys assigned special importance to identifying the IRS agents with the grand jury. When conducting interviews in connection with the investigation, Raybin and Mendrop were directed by the prosecutor to inform witnesses that they were "assisting a grand jury investigation in the Judicial District of Colorado." K.Tr. 619; *see also* G.J. Tr. Mendrop, August 5, 1981, 4:04 p.m., at p. 2; G.J. Tr. Raybin, July 8, 1981, 9:11 a.m., at p. 5, September 29, 1982, 2:32 p.m., at p. 2.[6]

Third, contrary to the role of the IRS agents described to the grand jury by the prosecutors, Mendrop and Raybin *did not* view their role and conduct their investigation as agents of an independent, unbiased grand jury. Rather, they viewed their role as agents of the Department of Justice, not the grand jury. When asked if his function as an agent of the grand jury was to assist the grand jury, Raybin testified:

> A: My duties were designed to assist the Department of Justice in its investigation. . . .

K.Tr. 232.

Mendrop similarly interpreted his role as agent of the grand jury to be "primarily" to assist the prosecutors:

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analyze [the documents] and basically figure out what they mean." G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:39 a.m., at p. 21; *see also* G.J. Tr. Remarks of Prosecutor, July 8, 1981, 12:05 p.m., at p. 5. The agents worked, in form, for the grand jury; but, in substance, they worked for the prosecution.

[6] Mendrop and Raybin claim that they never introduced themselves to witnesses as agents of the grand jury. K.Tr. 243, 266-67, 366-67.

> Q: . . . Mr. Mendrop, who were you really assisting in this matter during the grand jury investigation?
>
> A: Well, *primarily, I was assisting the attorneys for the government* and indirectly I'm sure that I must have been assisting the grand jury through the work that I was doing for the investigation that they were, that they had under consideration.
>
> Q: Well, in fact, you directly represented to the grand jury that you were assisting them, did you not, sir?
>
> A: I'm not sure how you mean that.
>
> Q: In fact, you represented to the grand jury that you were their agent and Mr. Snyder also represented to the grand jury that you were their agent; is that correct, sir?
>
> A: I believe those words were used, yes, sir.

K.Tr. 401-02 (emphasis supplied).

Ironically, the government attorneys who created the grand jury agents and described their role are confused themselves as to whether the "agents" roles should be considered aligned with that of independent grand jurors or the prosecutors.[7] K.Tr. 534-35; 1126.

Fourth, the government attorneys used the "grand jury agents" to do more than assist the attorneys in the investigation. They used them to summarize evidence in front of the grand jury. On the first day that the second grand jury convened, after his pseudo-investiture as a grand jury agent, Raybin summarized the investigation so far conducted, explained tax shelters to the jury, and opined that the circular financing utilized in the tax shelters under investigation was illegal. *See* G.J.Tr. Raybin,

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[7] *See supra* note 5 and accompanying text.

September 29, 1982, 2:32 p.m.; Mendrop, September 29, 1982, 9:32 a.m.; Raybin, September 30, 1982, 10:40 a.m. Similar kinds of substantive testimony were given by Raybin on September 9, 1981 and March 3, 1982. *See* G.J. Tr. Raybin, September 9, 1982, 10:02 a.m.; March 3, 1982, 1:19 p.m. On September 29 and 30, 1982, when the government attorneys, and apparently the "agents of the grand jury," were seeking the indictment, Raybin and Mendrop purported to summarize the evidence for the grand jury to support the 27 count indictment presented by the government attorneys. On September 30, 1982, Schneider appeared as "the expert" in the field of tax shelters to summarize the legal theory. G.J. Tr. Schneider, September 30, 1982, 9:22 a.m. These summaries contained numerous inaccuracies and were misleading in several aspects. Although the government attorneys were quick to inform the grand jury of their role as advocates, the grand jurors were never informed that their "agents" were "primarily" representing the interests of the Department of Justice attorneys.

Finally, the prosecutors' creation and use of grand jury agents resulted in many other abuses and Rule 6 violations. Most notably the agents made many joint appearances before the grand jury, without the presence of government counsel, and read transcripts to the jurors. K.Tr. 483-87; 636-39; 691-92; 707-12.

Raybin and Mendrop appeared before the second grand jury to give testimony regarding the investigation. Each time they appeared alone, were sworn, and were examined by the government attorneys. When they appeared to read testimony from the first grand jury to the second grand jury, they appeared together, were apparently not sworn, and were not examined by government attorneys because the latter were usually absent. It is not clear in what capacity they were appearing to read testimony. The confusion was exacerbated by two other IRS agents—Burke and Shea—also appearing together to read testimony to the second grand jury. In what capacity they were appearing is even less evident since they were not made "grand jury agents" and the record of their appearance does not support a finding that they were witnesses.

The transcripts of the agents' simultaneous appearances establish that they were not present as witnesses. They appear not to have been sworn; they appeared together; they were not examined; and they were mostly unaccompanied by government attorneys. The testimony of the prosecutors and agents that the agents were sworn, even if evidenced by a transcript, would not authorize their simultaneous appearances under Rule 6(d). The recollection of the prosecutors and agents that the oath was administered is challenged by the almost dozen transcripts showing the oath was not administered on any single occasion where the agents appeared together.

The record reveals that the agents' many appearances before the second grand jury, whether sworn or unsworn, were largely unsupervised. The agents were frequently unattended by government attorneys and, in some instances, may have convened the grand jury sessions without government counsel in order to read testimony. K.Tr. 483-87; 636-39; 691-92; 707-12.

In other instances the transcripts do not make clear precisely when the agents entered or left the grand jury room. It appears that they may have been present while the prosecutors engaged in colloquy with grand jurors. G.J. Tr. Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at p. 18; Remarks of Prosecutor, February 4, 1982, 3:30 p.m. at pp. 2-3; Remarks of Prosecutor, April 6, 1982, 9:08 a.m. at p. 8.

Both prosecutors acknowledge that the agents "*were not* under examination" when they read to the grand jury. K.Tr. 485 (emphasis supplied); *see also* K.Tr. 707. The conclusion that they were not under examination is

inescapable because no attorney was present to conduct an examination. Further, the grand jurors were under instructions *not* to question the agents during such appearances. K.Tr. 481-87.

B. Improper Disclosure, Improper Use and Secrecy Violations

During the course of the grand jury investigation, the government representatives systematically disregarded the strictures of Rule 6(e). The record demonstrates that the responsibility and decision making authority that Rule 6(e) vests in government attorneys was relinquished to and exercised by the Internal Revenue Service. Members of that agency undertook a policy of determining whether and to whom disclosure of confidential material would be made and whether notification of such disclosure would be made pursuant to the Federal Rules. Moreover, the evidence suggests that information was disclosed to other IRS agents for use in civil cases. Grand jury secrecy was repeatedly breached by those with a duty to remain silent and secrecy obligations were imposed upon others of whom the law does not require confidentiality.

(1) Disclosure

The disclosure notices filed pursuant to Rule 6(e)(3)(B) indicate that numerous individuals at all levels of the Internal Revenue Service, many of whom were assigned from the civil division of that agency, were permitted access to grand jury material. DX Q; *see* K.Tr. 26, 29-36, 40, 43, 50. The hearings have demonstrated that numerous other IRS personnel (all of whom were civil personnel), were given access to grand jury material, that these people were never identified on a disclosure notice and that they remain unknown even now.

That the decision as to which individuals should be privy to the grand jury material was frequently made

by the IRS, rather than by the prosecutors, was admitted by the agents.[8] K.Tr. 241. That it was the norm is confirmed by several additional facts. Disclosure was made liberally and often before obtaining attorney approval, an act the prosecutors acknowledged violates Department of Justice rules. K.Tr. 57-69; 754. Notice of such disclosure was not made "promptly" as required by Rule 6(e). The decision as to which names to include on the disclosure lists was largely left up to the IRS agents. The integrity of the lists themselves, as well as the decisions to make disclosure to the listed personnel, is lacking. The government attorneys admitted that they were unable to identify a substantial number of those named on the disclosure notices. K.Tr. 498-99. Further, these notices were frequently filed by attorneys having little relationship to the investigation. *See* K.Tr. 15-67; DX Q. The IRS agents were likewise unable to identify many of the persons on the list or why they were listed. K.Tr. 14-22, 30, 36-38, 39, 43-44, 56, 60-61, 65, 69, 106-09.

Perhaps the best illustration of the insouciance with which grand jury disclosures were made and recorded appears in the circumstances surrounding the post-indictment notice. The agents were directed by the government attorneys to pick their brains and prepare a catch-all disclosure notice listing any individuals whom they could recall may have had access to secret grand jury materials but who were not listed as required. Thus, on October 20, 1982, approximately three weeks after the indictment was returned, a final notice of disclosure adding sixteen names of IRS employees was filed. K.Tr. 57-59.

The agents' post hoc attempt to determine to whom disclosure had been made in order to supplement the dis-

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[8] The government claims that all prosecutorial decisions made by IRS agents were done in consultation with the prosecuting attorneys. K.Tr. 145-46.

closure notices was not entirely successful. Numerous persons with access to grand jury material were forgotten and never included on the notices. The discovery of these forgotten people occurred only because, during the hearings, government representatives testified at length concerning two computer programs compiled from grand jury documents, ostensibly for purposes of assisting in the grand jury's investigation. *See, e.g.*, K.Tr. 71-79, 87-91, 157-61. The performance of this function was riddled with Rule 6(e) violations.

Although the prosecutors testified that a court order was obtained permitting the transfer of the derivative grand jury information for that purpose to Lowry Air Force Base, the government was unable to produce such an order at the hearings. K.Tr. 494-9; 517; 755; 807. The prosecutors acknowledge that no order was obtained permitting transfer of similar information to Dallas and Utah, a failure caused by their unawareness even at the hearing that the IRS agents had taken it upon themselves to arrange for the computer work to be done at those locations and because the prosecutors left the "details" of the computer work to the IRS. K.Tr. 87-88, 494-96, 523, 807.

Many IRS employees with access to information used in compiling the computer program were eventually listed on the disclosure notices. *See* K.Tr. 34, 40, 43, 61, 72, 76, 78. Just as many, however, apparently never found their way onto the lists. Although the computer programs were created by computer "groups" in Dallas and Ogden (K.Tr. 74-76), the Disclosure Notices list few, if any, of the computer personnel from Utah or Texas. The indifference of the government attorneys is further revealed by the fact that a student clerk assisting the prosecutors was not listed as having had access to grand jury material although it was revealed at these hearings that she did. K.Tr. 1085-87.

Whatever instructions there were, if any, concerning disclosure and use of the grand jury material was apparently passed on by the staff of the Internal Revenue Service itself and not by the Department of Justice attorneys. Little or no instruction concerning the strictures of Rule 6(e) is included in the training of many of those IRS employees who had access to the information. K.Tr. 155.

Further, when the IRS agents acting as "agents of the grand jury" undertook the task of explaining the secrecy provisions to other employees of the IRS, it is clear that the information was of little practical use. For example, one such agent testified that, although he informed the supervisor of the computer program that he should disclose information only to one whose name was listed on the disclosure notices, only a few of the names on those lists were revealed to the supervisor. K.Tr. 155.

(2) Improper Use

The free rein given the IRS by the Department of Justice attorneys in this investigation and in the use and disclosure of grand jury material presents a serious possibility that the extraordinary powers of the grand jury were manipulated in order to obtain evidence useful in later civil litigation. The record reveals that such a danger was real and that substantial investigative activities disclosures were made for purposes other than "to assist an attorney for the government in the performance of [his] duty to enforce federal criminal law." *See* Rule 6(e)(3), Fed.R.Crim.P.

IRS institutional intent to take advantage of the grand jury investigation in civil audits was confirmed by Richard Gullion, a civil IRS agent assigned to the examination division in Denver, who freely acknowledged that the IRS hoped to take advantage of the facts developed by the criminal investigation after conclusion of the crim-

inal proceedings. W.Tr. 836-38. The government, in resisting this claim, has asserted that no improper disclosure to IRS civil agents has occurred. K.Tr. 150-51, 413-14, 416-17, 645-46. Disclosure is only one of the forbidden purposes. It is equally improper to manipulate the grand jury investigation to obtain evidence for eventual civil use by the IRS. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983). As is discussed below, the record confirms that the grand jury's extraordinary powers and resources were, in part, initiated and channeled for just such a purpose.[9]

The government's investigation of defendants originated at the IRS in 1979. From August, 1979 to July, 1980, the IRS conducted a joint civil and criminal investigation. In July, 1980, the IRS referred its investigation to the Tax Division of the Department of Justice with the recommendation that a grand jury investigation be conducted because its administrative processes were potentially ineffective. DX M.

The agents' testimony that they abandoned all civil interests when the grand jury commenced reminds me of Joel Chandler Harris' story about Bre'r Rabbit asking the fox not to throw him in the briar patch. At least one witness believed that the government was anxious to build civil cases through the use of grand jury information. W.Tr. 73-74. Several facts confirm that the IRS agents did not abandon entirely IRS civil interest in recouping taxes.

For example, agents of the IRS interviewed numerous tax shelter investors. The interviewees were threatened

[9] The occasional self-serving statements by prosecutors to the grand jury that use of grand jury information in IRS audits is improper does not absolve the improper disclosures but merely serves to highlight the seriousness of the misconduct. G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:30 a.m., at pp. 12-13; November 4, 1981, 9:12 a.m., at p. 6.

that if they did not speak voluntarily a grand jury subpoena might be obtained. Thus, they were informed that the interview was being conducted in lieu of a grand jury appearance. K.Tr. 191. In connection with these investor interviews the IRS agents assisted in the creation of "Investor Questionnaires." These questionnaires instructed interviewers to ask numerous questions concerning the tax shelters. Several of the questions involved investor motives, a subject of no conceivable relevance to a criminal investigation of the targets but highly relevant in a civil audit of the investor. DX W; G.J. Tr. Raybin, January 6, 1981 at pp. 4-7. That this interviewing program had no criminal investigation purpose is demonstrated by the fact that no investor, let alone any investors interviewed, appeared before the grand jury. None of the interviews, nor the results of the interviews, was presented to the grand jury. K. Tr. 149. The government offered no explanation at the hearings of why and for what purpose such interviews were conducted.

Civil IRS employees, armed with grand jury information, were brought into the investigation to prepare audits of the tax shelter investors. These audits, like the interviews, were not presented to the grand jury and no reasons or explanations for their preparation were offered at the hearings. K. Tr. 149.

IRS activity since the return of the indictment confirms its intent to utilize the grand jury investigation and information for civil litigation purposes. Since return of the indictment the IRS has issued civil audit letters to the investors interviewed, notifying them that their returns were being examined. The letters read in part: "[a] report will be issued in the near future containing a position consistent with *facts* as presented in the Federal Grand Jury Indictment of September 30, 1982, for the United States District Court for the District of

Colorado." DX L (emphasis supplied); *see also* K. Tr. 176-78, 344-48.

Finally, several statements attributed to the prosecutors by witnesses during the course of the investigation confirm that the grand jury proceedings, at least in part, were conducted for other than legitimate federal criminal purposes. Richard Birchall, a former attorney with the Department of Justice, testified that "[t]here was a vengeance to the manner in which [the prosecutor] conducted the investigation." W.Tr. 69. Mr. Birchall also reported that on one occasion the prosecutor indicated that even if he were unsuccessful on the merits, the defense would be excessively expensive to the defendants. W. Tr. 133.

A similar improper motive was testified to by Donald Morrison a witness who made numerous grand jury appearances. With regard to a proposed business activity of some of the defendants, Morrison testified that a prosecutor indicated they were going to "shoot in [the] ass [the] coal deal." W. Tr. 192. These statements were vigorously denied by the prosecutors. I am in no position to resolve the obvious conflict in the testimony by assessing the credibility of witnesses appearing before Judge Winner with those appearing before me. Thus, I do not find as a fact that the statements were actually made. I describe them here because they illustrate the infusion of hostility and vitriol which permeates this entire case—a condition which I attribute to the frequently rude, consistently arrogant, and occasionally obnoxious conduct of some of the government attorneys assigned to the prosecution of this case.[10]

(3) Secrecy Violations

Several instances demonstrate blatant disregard for the time-honored tradition of grand jury secrecy. As discussed below, such violations were utilized by the

[10] For examples, see sections of this opinion entitled "Facts Established by the Record," F. and G.

government, not only to gain what was certainly perceived as an advantage in connection with the intended prosecution but were also apparently part of an improper attempt to embarrass the targets and hinder the ongoing operation of their business during the course of the grand jury investigation.

Throughout the course of the grand jury investigation the government widely publicized the names of the individuals and entities that were being investigated as well as the nature of the grand jury's inquiry. The dissemination of information concerning the proceedings before the grand jury was undertaken without the circumspection normally afforded such disclosure by government attorneys. Such disclosures were particularly egregious insofar as the recipients of the information were known customers and business associates of the targets.

With the knowledge of Department of Justice attorneys, numerous letters were sent out identifying the targets, the related entities and the nature of the criminal investigation. The letters were sent to individuals beyond the subpoena power of the grand jury and with whom it was understood the targets had ongoing business and professional relationships. The letters, which were written on the letterhead of the United States Attorney, but signed by supposed agents of the grand jury, were not only misleading in terms of the capacity in which they were sent, but also clearly posed a danger of adversely affecting the acknowledged business and professional relationships. K.Tr. 121-25, 597-98, 969-75; DX V-1 through V-15; DX Y.

The text of the letters read in part as follows:

> *The United States Department of Justice is conducting a Grand Jury investigation of the business activities of William A. Kilpatrick, Declan J. O'Donnell, John Pettingill and Sheila C. Lerner* for the years 1977 through 1980. The Grand Jury is at-

tempting to determine whether these individuals, through United Financial Operations, Inc., P & J Coal Company, Inc., Marlborough Investments, Ltd., International Fuel Development Corp., Ltd., and International Block Construction Company, Ltd., have committed violations of Title 18 and Title 26 of the United States Code.

The Grand Jury has obtained information which indicates that you have had and/or currently do have a business relationship with one or more of the individuals and/or entities listed above. It has been determined that your testimony will be helpful in resolving questions which still face the Grand Jury. Subsequently, the United States Department of Justice cordially invites you to appear and testify before the Federal Grand Jury in Denver, Colorado (U.S.A.) at your convenience. Transportation, lodging and meals will be arranged for and paid by the United States Department of Justice.

• • • • • •

We look forward to your response,

Sincerely yours,

STEPHEN L. SNYDER
Trial Attorney
Criminal Section
Tax Division
By PAUL E. RAYBIN
Special Agent

(emphasis supplied)

The impropriety of publicly identifying targets in these letters was readily apparent to Judge Winner:

> [T]he identity of the persons and the transactions which were under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that.

575 F.Supp. at 334.

The prejudicial disclosure of the targets and the nature of the grand jury's investigation, however, was not limited to these "startling letters." During the course of the investigation, the "agents of the grand jury," and other employees of the IRS, ostensibly in connection with the ongoing criminal investigation, interviewed numerous investors in the tax shelters. Those investors, too, were informed of the nature of the grand jury's inquiry and the names of those being investigated. K. Tr. 93-94.

Rule 6(e) imposes upon government attorneys the obligation to secure grand jury information from improper disclosures. That obligation was breached several times. The disclosure of secret grand jury material was not limited to identification of the targets of the investigation. Grand jury information was also shared with Richard Birchall a witness and one-time potential target.[11] Details of the investigation were revealed to Birchall during a meeting in which one of the prosecutors attempted to persuade him to assist in the government's investigation by suggesting that the grand jury had received evidence warranting his consideration as a target. W.Tr.44-52, 983-84; 575 F.Supp. at 332-33.

Moreover, Birchall, who apparently was led to believe that he might face criminal exposure, was left unattended in a room housing grand jury material. He admittedly utilized the opportunity to rummage through the grand jury documents. 575 F.Supp at 332-33. In further disregard of the secrecy provisions of Rule 6(e) another witness, Bernard Bailor noted that the room in which the grand jury material was housed was generally left

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[11] Both government attorney Snyder and agent Mendrop dispute Birchall's testimony. K.Tr. 423-36; 376-89.

open. W. Tr. 1130-31. Judge Winner commented that he found Mr. Bailor's testimony to be knowledgeable and candid during the hearings. 575 F.Supp. at 338-43.

Whatever may be said as to the impropriety of Richard Birchall's rummaging through grand jury testimony and documents when he was left alone in the grand jury storage room, it does not excuse the government attorneys' impropriety in availing him of that opportunity. Before leaving him alone in the grand jury storage room they accused Birchall of making several extortion threats to O'Donnell, a target of the investigation. K.Tr. 377, 381, 422-23, 425-26. Birchall obviously took advantage of the opportunity improperly provided to him to search through the grand jury records and documents.

(4) Improper Imposition of Secrecy Obligations

For what the record reveals was clearly an improper strategic purpose, secrecy obligations in clear violation of Rule 6(e)(2), Fed.R.Crim.P., were imposed upon two grand jury witnesses. On January 5, 1982, David H. Hoff and David R. Major appeared before the grand jury. When Hoff appeared separately before the grand jury he was advised:

> Q: You are also aware that the proceedings of this Grand Jury are secret and that is covered by Rule 6 of the Federal Rules of Criminal Procedure, that is, any questions I put to you today, questions that the Grand Jury may have, any discussion we have in this room at your appearance, that your appearance should be kept secret by you; do you understand that?
>
> A: Yes, sir, I do.

G.J.Tr. Hoff, January 5, 1982, 9:59 a.m., at p. 4. A similar directive was given to David R. Major, G.J.Tr. Major, January 5, 1982, 11:13 a.m., at p. 5.

These confessed violations of Rule 6(e) were neither innocent nor inadvertent. Rather, the record reveals the improper obligation to keep the information and fact of their appearances secret was imposed for a strategic purpose.

Both witnesses occupied positions as attorneys who had formerly represented Defendants Kilpatrick and O'Donnell in previous SEC proceedings involving the same tax shelters under investigation before the grand jury. *See* G.J.Tr. Remarks of Prosecutor, January 5, 1982, 9:09 a.m., at p. 8. The government attorney explained to the grand jury the purpose of calling them as follows:

> The primary focus of our investigation involving the financing is the factual representations made concerning Marlborough Investments Limited, IFDC; we want to know what the lawyers were told by the principals, and what information they relayed to the parties.

G.J.Tr. Remarks of Prosecutor, January 5, 1982, 9:09 a.m., at p. 12. Thus, the government attorney imposed the unauthorized secrecy obligations upon these two witnesses to prevent defendants from determining the nature and extent of any such communication that might have been revealed and to foreclose a challenge to such testimony based upon an applicable privilege.

Such a conclusion is buttressed by the fact that the same government attorney examined four other witnesses that same day, several witnesses two days later on January 7, 1982, and approximately fifteen witnesses on other occasions. *None* of those witnesses were given the same directive. The prosecutors were fully cognizant that Rule 6(e) prohibits the imposition of secrecy obligations on grand jury witnesses.[12]

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[12] *See supra* note 20.

Indeed, during these hearings, the Department of Justice attorney involved acknowledged that at the time he imposed the improper obligations he was aware of the United States Attorneys' Manual provisions prohibiting the imposition of an obligation of secrecy upon a witness. Yet, although provided with ample opportunity, he was unable to offer any legitimate reason for his transgressions. K.Tr. 697-99.

C. Use of Pocket Immunity

During this investigation, Department of Justice attorneys ignored entirely the federal immunity statute (18 U.S.C. §§ 6001, *et seq.*) which prescribes the congressionally authorized procedure for conferring grants of immunity and, instead, secured testimony by engaging extensively in what I have previously described as the "damnable practice" of bestowing "informal immunity" through "letters of assurance." *United States v. Anderson*, 577 F.Supp. 223, 233 [13] (D.Colo.1983). The testimony of 23 witnesses in this investigation was secured by means of such "immunity" conferred by Snyder and Blondin. K.Tr. 513. Not one witness was given statutory immunity.

The profligate issuance of such "letters of assurance" had its inception shortly after the investigation commenced, in a telephone call between one of the prosecutors and Bernard Bailor, Esq., who, with his firm, represented many of the witnesses who later received such letters. K.Tr. 476. Bailor explained that his clients would not testify voluntarily before the grand jury. In response, the prosecutor suggested that in lieu of statutory immunity he would be willing to issue letters of assurance. Mr. Bailor accepted the offer and at that point a pro-

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[13] As discussed later, *see supra* text accompanying note 21, I now believe I was unduly diffident in *Anderson*. The practice is not merely damnable; I believe now that it is clearly illegal.

cedure for issuing the so-called informal "immunity" was inaugurated. K.Tr. 476-77.

After reaching his agreement with Bailor, the prosecutor apparently consulted with senior assistant chief Edward Vellines of the Tax Division. According to the prosecutor, Vellines indicated that the prosecutor had the authority to issue such letters of assurance provided he abided by the instructions of a Department of Justice memorandum *and* the United States Attorneys Manual *and* provided further that the recipient was not a target of the investigation. K.Tr. 514-15; 602; 623.

Thereafter, the prosecutors undertook, without seeking specific approval from any superior, what was characterized as a "liberal" policy of distributing this type of informal immunity to witnesses. At no point was an effort made to obtain statutory immunity for any witness, nor was the United States Attorney's Office for the District of Colorado informed of the issuance of such letters though written on United States Attorney's stationery. K.Tr. 476-77, 720, 731-32; 575 F.Supp.335-36; Remarks of Prosecutor, February 2, 1982 at 1:07 p.m. at p. 5-8; DX U-1-U-17.

No witness who testified pursuant to this form of informal "immunity" bestowed by the prosecutors indicated that he or she would have been less cooperative or unwilling to testify had he or she been granted statutory immunity. Rather, the government attorneys readily concede that they chose the method they did simply for the sake of expediency—to by-pass the review procedure established by Congress in the statutory scheme. K.Tr. 476, 721-22; 724-28. Among the vehicles for review avoided by the unauthorized method chosen here was the statistical compilation that Congress indicated as among its purposes for establishing the statutory procedure. Indeed, the government acknowledged that, unlike grants of statutory immunity on which central rec-

ords are maintained, there is no realistic way for the Department of Justice to determine the number of letters of assurance executed. K.Tr. 729; 839. Despite what the prosecutor explains were his specific instructions, informal immunity was bestowed upon individuals once considered targets of the investigation (*i.e.*, John Jewell and Richard Bell). Moreover, one of the prosecutors admitted having conferred immunity upon an individual who it was later learned had failed to file tax returns for several years. K.Tr. 734-35; *see also* G.J.Tr. Kitrick, May 5, 1981, 10:36 a.m., at p. 3-4; Stephenson, April 6, 1981, 3:01 p.m., at p. 3-4, 575 F.Supp. at 335.

In their deliberate efforts to avoid the review process and the certainty that Congress intended in the granting of witness immunity, the prosecutors injected serious ambiguity in the critical area of witness credibility. Several facts demonstrate the seriousness of the ambiguity created by this unauthorized procedure.

Despite alleged explanations of letters of assurance,[14] the grand jurors whose job it was in this investigation to assess witness credibility were presented with conflicting descriptions of the effect of these letters upon the wit-

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[14] The government's brief, Government's Response to the Bank of Nova Scotia's Proposed Findings of Fact and Conclusions of Law, filed April 9, 1984, at p. 19 provides:

> On February 2, 1982, Mr. Snyder advised the grand jury of his negotiations with Mr. Bailor [attorney for many of the witnesses], and again explained to the grand jury the difference between statutory immunity and letters of assurance. 2/2/82 (1:07 p.m.) G.J. Colloquy 5-14.

The transcript for G.J. Tr. February 2, 1982, 1:07 p.m. presents the testimony of Gordon MacManus. The substance of the testimony consists entirely of an inquiry as to whether Mr. MacManus's attorney was being paid for by Realty Inc. and whether Mr. MacManus would invoke his right against self incrimination. Contrary to the government's assertion, the transcript reflects the prosecutor's attempts to prejudice the grand jury. *See supra* text accompanying note 15.

nesses and, consequently upon the value to place upon their testimony. On some occasions, the witnesses were advised before the grand jury that the letters gave them "immunity" and that they had no Fifth Amendment privilege. *See, e.g.*, G.J.Tr. Stanley, April 6, 1981, 4:27 p.m., at p. 5; Stephenson, April 6, 1981, 3:01 p.m., at p. 4; Kitrick, May 5, 1981, 10:36 a.m., at p. 4; Miller, June 2, 1981, 9:28 a.m., at pp. 3-4. On other occasions, witnesses were advised that although they were testifying after receiving a letter of assurance, they retained their Fifth Amendment privilege and could refuse to testify. *See, e.g.*, G.J.Tr. Jewell, February 4, 1982, 1:19 p.m., at pp. 2-3; Caddell, February 4, 1982, 10:50 a.m., at p. 3; Folsom, April 6, 1982, 11:42 a.m., at p. 4; *see also*, G.J.Tr. Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at pp. 5-8.

Moreover, the prosecutors' avoidance of statutory immunity in this investigation left every witness in the posture of testifying with the impression and fear that unless the witness' testimony pleased the government, the government might withdraw its assurances. That such a fear was more real than imagined was apparent to Judge Winner in his review of the events surrounding the grand jury appearance of Richard Bell, a witness who testified with a "Letter of Assurance."

> Mr. Bell was represented by his brother, Malcolm, an attorney practicing in New York City, and a witness I found to be straight-forward, fair, convincing, and most generous to Mr. Snyder. Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told by Mr. Snyder that if Richard 'testified for Mr. Kilpatrick, all bets were off.' Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of 'all bets are off' wouldn't confront us.

575 F. Supp. at 335.

The meaning of the admonition of the prosecutor was a "nagging question" to Malcolm Bell, who as an experienced attorney ultimately determined that the prosecutor must have meant that the deal was not withdrawn but that Richard Bell was subject to perjury. More significantly, however, Richard Bell, as would most lay witnesses, believed it meant the "Letter" would be withdrawn. T.Tr. 460-63.

D. Witness Invocation of Privilege Against Self-Incrimination

The prosecutors pursued their course of distributing letters of assurance "quite liberally" until, in the words of one of them, it was decided "all good things come to an end." G.J.Tr. Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at p. 5. At that point they replaced the unauthorized procedure with the equally abusive and dubious practice of calling witnesses who had not been issued letters and having them invoke their Fifth Amendment privilege before the grand jury regarding the targets and the transactions under investigation; knowing in advance that they would do so. K.Tr. 515.

In all, seven witnesses were called to invoke their privilege in February and March, 1982. That the purpose was to prejudice the grand jury against the targets and the tax shelter transactions under investigation, and not to lay a statutory predicate for immunizing the witnesses (which the prosecutor never did) cannot be denied. First, the prosecutor who called the witnesses admitted that he did not do so to obtain congressionally authorized grants of immunity. K.Tr. 515. Second, the uniform questions posed to the witnesses evidence the intention to utilize the witnesses assertion to prejudice the grand jurors against the targets:

> Q: Now, Mr. Drizin, if I would ask you any questions concerning any relationship you may or may not have had with William A. Kilpatrick, John Peddingill [sic], Sheila Lerner or Declan J. O'Donnell or United Financial Operations, would you assert your right against self-incrimination on those questions?
>
> A: Yes, sir.

G.J.Tr. Drizin, March 2, 1982, 9:29 a.m., at p. 4. Third, the prosecutor did not limit his questioning merely to have the witness invoke his Fifth Amendment privilege but rather questioned several of the witnesses to elicit that Kilpatrick's company, United Financial Operations, was paying their attorneys' fees, leaving the grand jury with the impression that their refusal to testify was being financed by the targets.[15] *See e.g.*, G.J.Tr. D'Amico, February 4, 1982, 12:35 p.m., at pp. 6-7.

That the prosecutor's conduct in this regard (which occurred before the second of the two grand juries empanelled in connection with this investigation) was known to him to be improper and prejudicial is revealed by his statements to the first grand jury several months earlier:

> Immediately all the witnesses I had subpoenaed today decided that they would not want to come in here and testify and they said they would assert their Fifth Amendment rights.
>
> I could force them in here under their Fifth Amendment rights, but under the Department of Justice guidelines *I should not do that except in exceptional circumstances should I bring a person in here and have them assert their Fifth Amendment rights because it serves no purpose and it only serves to prejudice, and it can prejudice a layman.*

G.J.Tr. Remarks of Prosecutor, February 2, 1981, 9:40 a.m. at pp. 2-3 (emphasis supplied). Indeed, the prosecutor did to the second grand jury precisely what he

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[15] *See supra* note 14.

told the first grand jury he could not and should not do. The only difference is that, when he did it anyway, he did not tell the grand jurors that he was doing it to them. General instructions, months prior, that jurors not draw inferences from an individual's invocation of the privilege against self incrimination cannot correct such corruptions of the grand jury process. G.J.Tr. Remarks of Prosecutor, July 8, 1981, 10:50 a.m., at p. 6; January 5, 1982, 9:09 a.m., at pp. 22-23.

E. Government Summaries of the Evidence

Although the investigation of the instant case covered almost two years, the transcripts reveal that the case against The Bank of Nova Scotia was, for the most part, presented on a single day, September 29, 1982, the day before the indictment was returned. It was done, moreover, almost exclusievly by having Mendrop summarize the "evidence" against the bank. The government seeks to explain these summaries as nothing more than legitimate use of hearsay testimony by the grand jury. *See United States v. Rogers*, 652 F.2d 972, 975 (1981).

During the course of the September 29, 1982 proceedings, the grand jurors expressed concern that The Bank of Nova Scotia was being singled out for prosecution while other banks that allegedly permitted similar banking activity were not being named as defendants. In response, the prosecutor suggested that the Bank of Nova Scotia was a more appropriate target because, unlike the other institutions involved, it was a large internationally known bank doing business in the United States and its prosecution could be expected to deter others. *See* G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at p. 50-52. The prosecutor erroneously suggested that the "evidence" indicated that The Bank of Nova Scotia representatives were familiar with the operation of Kilpatrick's business and that the IRS was to be defrauded by virtue of the banking activity. *See* G.J.Tr. Remarks of Prosecutor, September 29, 1982, 8:52 a.m. at pp. 8, 13.

No evidence of the kind suggested by the prosecutor had been presented to the grand jury. The discussion of these points was heard for the first time during the testimony of Mendrop. Instead of being presented as a witness who was to present hearsay investigative information concerning the Bank's role, Mendrop was introduced to the grand jurors as one who was to "summarize" and "just walk through, one more time, and refresh your memory." G.J.Tr. Remarks of Prosecutor, September 29, 1982, 8:52 a.m. at p. 5. Mendrop then proceeded to "summarize the evidence relating to each of the individuals involved" and "the evidence pertaining to The Bank of Nova Scotia." *See* G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at pp. 40, 52, 64, 66, 72. On the vital issue of the bank's knowledge and intent, however, it is clear that Mendrop's testimony was both misleading and inaccurate. In particular, Mendrop purported to "summarize" in connection with the bank's role the testimony presented by three witnesses: Messrs. Waters, Ros and Charles. An examination of the grand jury testimony, however, reveals that it was not a summary of the evidence before the grand jury. One of the witnesses whose testimony was "summarized" never appeared before either grand jury. The other two witnesses whose testimony was "summarized" did not give testimony even remotely resembling that supposedly "summarized" by Mendrop. The grand jury was never informed of these mischaracterization or of any alternative basis for Mendrop's summary.

The inaccurate "summaries" of the evidence before the grand jury concerning the role of The Bank of Nova Scotia was particularly abusive for several reasons:

(i) The misleading "summaries were presented by an individual upon whom the grand jurors had been urged to rely as their "agent,"

(ii) The investigation spanned 20 months and two successive grand juries. Much of the testimony of the 27

witnesses who appeared before the first jury was read to the second grand jury in an improper and unsupervised manner,

(iii) The grand jurors had not previously focused on The Bank of Nova Scotia as a target since the bank was not mentioned as a target until the month the indictment was returned;

(iv) The reading of testimony from the first grand jury (which included the testimony of Ros and Charles) occurred early in the presentation of the case to the second grand jury. The grand jurors and the prosecutors frequently commented upon the monotony and difficulty of listening to the readings and, indeed, the grand jurors expressed confusion as to which transcripts had been read. *See, e.g.*, G.J.Tr. Remarks of Prosecutor, November 4, 1981, 9:12 a.m. at p. 5; Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at p. 20; and

(v) The improper summaries related to vital issues concerning the Bank's knowledge and intent. Unbeknown to the grand jurors, the government attorneys contemporaneously entertained serious doubts as to the accuracy of certain critical "facts" contained in the summaries.

In sum, the mischaracterizations reasonably could not have been expected to be picked up by the grand jurors and, undoubtedly, formed a substantial basis for the indictment against the bank. The examples of improper mischaracterizations of the evidence are detailed below.

(1) Mr. Waters

Asserting that he was discussing a "few of the pieces of evidence" and "the summary of the evidence pertaining to The Bank of Nava Scotia," Mendrop purported to summarize what the prosecutor characterized as the "evidence" provided by Waters about a trip supposedly made by defendant Monte Smith, the bank's Cayman Island branch manager, to Kilpatrick's offices in Denver. (Smith

was vital as it is upon his activities that the bank has been claimed vicariously liable.) G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at pp. 36, 64, 65-72; *see also* G.J.Tr. Remarks of Prosecutor, September 29, 1982, 9:07 a.m., at p. 10. According to Mendrop and the prosecutor, this claimed trip by Monte Smith was important because it demonstrated that Smith was familiar with Kilpatrick's tax shelter operations. Apparently unbeknown to the grand jurors, Waters never testified before either of the grand juries. The grand juries were never informed of the actual source of Mendrop's testimony which apparently was an interview of Waters or testimony of Waters at a contempt hearing involving Kilpatrick.

Whatever the source, it is clear that Mendrop's supposed "summary" of Waters' testimony is an inaccurate recitation of "facts" in several significant respects. At the time Mendrop was supposedly summarizing the "facts" of Monte Smith's trip to Denver, the government attorneys entertained serious doubts about its accuracy because Waters' description of the individual he met at Mr. Kilpatrick's offices did not resemble Monte Smith.[16] The testimony of Waters during the 1983 obstruction trial of Mr. Kilpatrick confirms the inaccuracies of Mendrop's testimony. During that trial Waters testified that when picking up some checks from Kilpatrick for payment due him, he was informed by Kilpatrick that one of the people present was Mr. Smith who was the manager of the Bank branch on which the checks were drawn. Mr. Waters' description of that individual during trial does *not* resemble Monte Smith. T.Tr. 311-12. In fact, at these hearings, commenting on Mr. Waters' somewhat unusual description of Monte Smith, one of

[16] The government claims that the doubts about the accuracy of Waters' description did not arise until after Mendrop testified. Nevertheless, even under the government's version, such doubts existed months before the indictment. K.Tr. 1067-68.

the prosecutors admitted that at the time "[t]here was a real question as to whether or not it was the same person." K.Tr. 742-43. Despite the facts that Waters was not called as a witness before either grand jury, that the grand jurors were never informed that transcripts of taped interviews of Waters existed and that a "real question" existed as to the accuracy of Waters' identification, Mendrop was permitted to represent to the contrary that there was "considerable confirmation that Mr. Smith did actually come out here and visit with Mr. Kilpatrick." G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at pp. 66-68.

(2) Mr. Ros

Raul Ros, a "chauffeur" for Mr. Kilpatrick, testified before the first grand jury. He did not appear before the grand jury that returned the indictment; his testimony was read to the second grand jury. G.J.Tr. Mendrop, September 9, 1981, 8:44 a.m., at p. 3. A year after Mendrop read his testimony to the grand jurors, Mendrop purported to summarize it. According to Mendrop, Ros' evidence confirms the testimony of Waters with regard to Monte Smith's appearance in Denver. G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at p. 66. Mendrop indicated that Ros commented that during Smith's claimed visit to Denver, he and Kilpatrick discussed funding for the tax shelters. No such testimony can be found in Raul Ros' grand jury transcript. Mendrop gave absolutely no explanation of an alternative source, but rather erroneously led the grand jurors to believe that he was simply relaying information contained in the Ros testimony before the prior grand jury.

(3) Mr. Charles

Mendrop's "summary" also mischaracterizes the testimony of Barry Charles. Like Raul Ros, Charles testified before the first grand jury not the second grand jury.

As he did with Raul Ros' testimony, Mendrop attributed "testimony" to Charles that the bank fulfilled virtually all of Mr. Kilpatrick's requests and that it "appeared" to Charles that the bank officers knew what was being done. G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at p. 68. The "summary" given by Mendrop is at odds with Charles' testimony. G.J.Tr. Charles, June 2, 1981, 8:40 a.m. Again, Mendrop did not identify any alternate source for the comments attributed to Charles.

In his testimony before the first grand jury Charles indicated that he was not present during most of the transactions in the bank. Charles, who traveled to the Cayman Islands with Kilpatrick, Pettingill and O'Donnell, was the least involved in the group and observed less than Oliver Hemphill who himself testified that he had witnessed little of the banking activity. *See* G.J.Tr. Hemphill, May 5, 1981, 9:28 a.m., at p. 12. Thus, Mendrop's suggestion to the grand jurors of the "evidence" to be gleaned from Charles "testimony" is contradicted by the actual testimony of Charles and others.

(4) Comments by the Prosecutor

In addition to presenting Mendrop's summary of the "important evidence" against the bank on the day before the indictment, the prosecutors also argued in favor of an indictment of the bank. Once again, the evidence against the bank on the essential issue of knowledge of the claimed object of the conspiracy was seriously mischaracterized by the prosecutor, who asserted:

> [A]s my agents will tell you there is evidence that the Bank knew it was the IRS—*they were in fact told that it was the IRS they were defrauding.*

G.J.Tr. Remarks of Prosecutor, September 29, 1982, 8:52 a.m. at p. 13 (emphasis supplied). No such evidence was ever presented. Indeed, even the misleading summary of Mendrop provides no basis for such a statement.

F. Interrogation in Absence of Counsel

In February, 1983, during the period between indictment and dismissal of the charges against The Bank of Nova Scotia, one of the prosecutors departed from the traditional role of a government trial attorney in order to travel to Puerto Rico and engage in investigative activity. The prosecutor undertook his journey with the intention of interviewing bank employees concerning the whereabouts and reasons for transfer of another bank employee, Malcolm Haynes, who the prosecutor understood was the second in command at the bank's Cayman Island branch during the period covered by the indictment. No attempt had been made to talk to this potential witness before indictment. The prosecutor's purpose was to interview him concerning matters underlying the indictment. W.Tr. 642-49; 694; 709-10.

Although the prosecutor was fully aware that the bank, an indicted defendant, was represented by counsel, he did not feel constrained by the Supreme Court's dictates in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) to inform counsel of his intentions to interview high ranking bank employees.[17] Instead, he undertook this investigative exercise with the "hope" of eventually interviewing Malcolm Haynes "in the absence of Mr. Morvillo," [18] firm in the belief that,

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[17] The government argues that interviewing Haynes does not give rise to *Massiah* violations because he was only "a potential witness who had information as to the bank's conduct concerning the events charged in the indictment." Government's Response to The Bank of Nova Scotia's Proposed Findings of Fact and Conclusions of Law, filed April 9, 1984, at p. 37. The government ignores *Massiah* because Haynes was not individually named as a defendant in the indictment. *Id.* Nevertheless, the government does recognize that Haynes "was the number two man in the Cayman Island branch of The Bank of Nova Scotia at the time of the events in question." *Id.* quoting W.Tr. 653.

[18] Mr. Morvillo is the bank's lead defense counsel.

if he committed a constitutional violation of the type identified in *Massiah*, the only likely sanction was the suppression of evidence in the government's case-in-chief. In the prosecutor's words, "no indictment has ever been dismissed because of [a *Massiah* violation]." K.Tr. 1114, 1122; W.Tr. 643, 693-94, 709-10.

The prosecutor also testified that he believed it was permissible to interview high ranking employees of an indicted corporate defendant because it was authorized in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) and because, unlike *Massiah* he was not engaged in acts of "subterfuge." [19] W.Tr. 643, 693-94, 709-10; K.Tr. 1114-15.

When he arrived in Puerto Rico, the prosecutor and another investigator, Victor Torrez Perez, an IRS special agent, appeared without prior arrangement at the branch offices of The Bank of Nova Scotia and proceeded to interrogate several of its representatives. Among others, they questioned Malcolm Haynes' former secretary and his replacement, the branch's controller. They also interrogated other high ranking representatives of the bank—including Douglas Rector, the Puerto Rico area manager of The Bank of Nova Scotia and chief executive officer of the Bank's Puerto Rico subsidiary. W.Tr. 640-42, 696-99.

After leaving the bank, accompanied by Special Agent Torrez Perez, he searched out the school attended by Haynes' two small daughters, ages eight and ten, in order to determine the whereabouts of their parents. At the end of the school day, the prosecutor (who had already elicited information from the school's principal and the girls' teachers) followed the children on foot "by about a hundred yards." His purpose was to have the girls lead him to their mother. W.Tr. 642-45; 699-708.

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[19] *See supra* note 23.

The prosecutor's visit to Puerto Rico, however, did not end his endeavor to interrogate high ranking representatives of the defendant bank without notice to or leave of defense counsel. Shortly after his interrogation of Mrs. Haynes, he wrote a letter to her requesting that she use her efforts to have her husband speak with the government. Like his previous efforts this approach was made without informing defense counsel. Indeed, the prosecutor asserted that he "would have interviewed Mr. Haynes in the absence of Mr. Morvillo hopefully." W.Tr. 709-10.

G. Mistreatment of Witnesses

Professor Roland Hjorth, a tax law professor who Judge Winner observed "is a recognized expert who was employed by defense counsel" was permitted to testify before the grand jury that returned the indictment. His treatment by the prosecutor on the occasion of his appearance contrasts markedly with the treatment the prosecution afforded its own expert, Roger Schneider, who was passed off as an "agent of the grand jury."

As Judge Winner observed:

> [Professor Hjorth's] views of tax law differed markedly from those of [the prosecutor], who bragged on frequent occasions that he had never taken a course in taxation and knew almost nothing about it. Nevertheless, Professor Hjorth was browbeaten and ridiculed by [the prosecutor], and some of the conversation so out of place for an ethical prosecutor took place during a recess in the hearing of some grand jurors.

575 F.Supp. at 333.

Indeed, the prosecutor's heated argument with Professor Hjorth was also overheard by witnesses scheduled to appear before the grand jury. W.Tr. 334. Moreover, the conduct was so shocking that Richard Slivka, a local attorney formerly employed by the Department of Justice

and Colorado United States Attorney's Office, who was representing witnesses scheduled to appear and who himself observed the conduct, wrote a letter to Chief Judge Finesilver shortly thereafter reporting the incident. W.Tr. 317-27; 350-64. Professor Hjorth testified that the prosecutor's conduct was so abusive that he would never again appear as an expert witness in a similar proceeding.

Judge Winner concluded of the prosecutor's conduct that:

> Intimidating witnesses by telling them that their testimony disgraces them and implying that the Tax Division of the Department of Justice will take after the witness and will complain to the University of Washington Law School because an expert testified to his expert opinions does no credit to our government. . . . [s]eemingly, the professor's testimony isn't seriously contested. I hope that we haven't gotten to the point that disagreement with the legal concepts of the IRS provide grounds for attacks by that bureaucracy because sometimes the IRS is wrong. *U.S. v. Sells Engineering*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 and *U.S. v. Baggot*, 463 U.S. 476, 108 S.Ct. 3164, 77 L.Ed.2d 785.

575 F.Supp. at 333; *see also* K.Tr. 502-05.

CONCLUSIONS OF LAW

The government's position in this case is reminiscent of the common law defense of confession and avoidance in which, for the most part, the truth of the averments of fact are admitted, but argument is made which tends to deprive the facts of their ordinary legal effect or obviates them. Thus, it is said:

> Just as there has never been a perfect lawyer, a perfect judge, or perfect trial, so has there never been a perfect investigation. Contrary to what one

> might expect, in view of the defense allegations, the transcripts of the grand jury proceedings do not reveal any conduct whatsoever by the prosecutors seeking to overreach or override the independence of the grand jury.

Government Memorandum, Government Response to The Bank of Nova Scotia's proposed Findings of Fact and Conclusions of Law, filed April 9, 1984, at pp. 3-4. The government's response to the defendants' several proposed findings of facts is mainly a recitation of the number of instances in which its prosecutors did not violate the law.

As I view the present state of the law as it applies to this case, there are four analytical modalities which must be considered. In the first, specific violations of specific rules require dismissal. I view this form of analysis as essentially quantitative. There either is a violation or there isn't and the conclusion is ineluctable depending on the factual premise which is established. The second modality, requires an evaluation of the totality of circumstances extant so that a qualitative assessment may be made. Finally, cases distinguish the third modality, the authority and duty of district courts to supervise the conduct of prosecutions and grand juries, from the fourth modality, the duty to enforce the mandates of the Constitution.

In articulating the conclusion of law I have reached in this case, I shall consider all four modalities in the order in which I have just expressed them. I shall begin with Rule 6, Fed.R.Crim.P.

A. Violations of Rule 6(d)

As noted by Judge Winner, Rule 6, Fed.R.Crim.P. does not authorize grand juries to have agents. The creation of that role and its misleading description to the grand jury is an improper intrusion into the exclusive and independent province of the grand jury by government attorneys and investigators. The most important function of the grand jury is to stand between the government agents and the suspect as an unbiased evaluator of the evidence. *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-773, 35 L.Ed.2d 67 (1973). "The purpose of the grand jury requires that it remain free, within constitutional and statutory limits, to operate independently of either prosecuting attorney or judge." *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 3141, 77 L.Ed.2d 743 (1983).

Rule 6(d), Fed.R.Crim.P., delimits those who may be present in grand jury proceedings by the following explicit language:

> (d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

After his usual thorough analysis of the relevant case law and with characteristic pungency, Judge Matsch, of our Court, stated in *United States v. Pignatiello:*

> A review of all of these cases reinforces the conclusion that the only effective sanction for a violation of Rule 6(d) is dismissal without any further inquiry into the effects of that violation.

582 F.Supp. 251, 254 (D.Colo.1984).

> I conclude that events which occurred in the grand jury room while *soi-disant* agents of the grand jury were present and not under oath as witnesses under examination violated Rule 6(d) and therefore require dismissal of the indictment. As Judge

Matsch carefully notes in *Pignatiello*, brief intrusions on the proceedings during which no testimony is taken nor questions asked nor statements made about the case by grand jurors such as the delivering of a note to the prosecutor by his secretary or the repair of a switch by a maintenance man are not included within the *per se* rule. In this case, there is no doubt that matters of considerable substance occurred while Rule 6(d) was being violated.

B. Violations of Rule 6(e)

Courts have held that violations of the strictures of Rule 6(e), Fed.R.Crim.P., typically require the sanction of contempt rather than dismissal. *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965). However, where Rule 6(e) is violated recklessly and systematically, dismissal is appropriate. *United States v. Gold*, 470 F. Supp. 1336, 1352-56 (N.D.Ill. 1979). Where knowing violations of Rule 6(e) prejudice and embarrass targets whose identities the government reveals, the government itself has recognized that the contempt remedy is "*not always* . . . wholly adequate." United States Attorneys' Manual § 9-11.370 (emphasis supplied).

(1) *Rule 6(e)(3)—Improper Disclosure and Use*

Rule 6(e)(3) provides in relevant part:

(3) Exceptions.

(A) *Disclosure otherwise prohibited* by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand jury, *may be made to*—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) *such governmental personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.*

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. *An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.*

(emphasis supplied).

The prosecutors in this case permitted several violations of this rule. They relinquished to the IRS their responsibility to determine the persons to whom disclosure would be made. The IRS agents then failed to provide the "prompt" notification of such disclosure mandated by the rule. Moreover, the IRS representatives, in direct contravention of recent Supreme Court dictates, improperly manipulated the secret material and their novel roles as "agents of the grand jury" to obtain information and data for use during civil litigation that they knew would follow on the heels of the criminal case. *See United States v. Sells Engineering, Inc., supra, United States v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983).

Rule 6(e)(3) provides that disclosure can be made to "such government personnel as are deemed necessary by an attorney for the government . . ." provided the "attorney for the government . . . promptly provide[s] the district court . . ." with notice of such disclosure. The instant record reveals not only that IRS representatives regularly took it upon themselves to determine to whom disclosure should be made, but also that in some cases the "attorneys for the government" were not notified of

such disclosure until after it had occurred, if they were notified at all. Moreover, notices to the district court were not filed promptly but were prepared in some instances substantially after such disclosure, even after the investigation had concluded and the indictment was filed.

With regard to the delegation of the Rule 6(e)(3) responsibilities in this investigation by Department of Justice attorneys, Judge Winner noted:

> I am troubled about testimony suggesting that authority to make the disclosure decisions was delegated to the IRS Special Agent/Grand Jury Agents/Prosecutor's helpers. Under common law rules of agency, this authority couldn't be delegated to a subagent, and especially it couldn't be delegated to an IRS agent whose fellow workers were aiming at the defendants from a different angle. My worry on this score is not lessened by an IRS letter in evidence saying that making a civil tax case under the administrative process would be difficult. *United States v. Sells Engineering* and *United States v. Baggot*, both *supra*, which settle the question of using a grand jury to collect taxes.

575 F.Supp. at 5 (1983).

The broad delegation to the IRS of control over the course of the grand jury investigation is amply supported by the record. The extensive disclosure of grand jury material to IRS civil employees, the haphazard and *post hoc* method of identifying those to whom disclosure was made and the omission from the disclosure notices of numerous IRS employees privy to grand jury information clearly contravene the rule. It is fanciful to suggest that these IRS and civil employees will erase from their minds that material obtained as part of the grand jury's investigation.

In *United States v. Sells Engineering, Inc.*, *supra*, the Supreme Court recognized that it is difficult or impossible

to demonstrate the extent of improper disclosure and use of grand jury material made during the course of an investigation. *Id.* 103 S.Ct. at 3142. In the instant case a significant portion of the direction of the investigation was unrelated to the federal criminal goals. As the Supreme Court observed:

> [B]ecause the Government takes an active part in the activities of the grand jury, disclosure to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit. . . .

Id.

In *Sells* the Supreme Court analyzed the grand jury process and the provisions of Rule 6(e) in deciding whether civil division lawyers in the Department of Justice should have automatic access to grand jury materials to assist them in civil litigation. The court denied such access for three reasons: (1) civil disclosure threatens to subvert the limitations otherwise imposed on the government's powers in civil and administrative discovery and investigation; (2) civil disclosure may tempt prosecutors to manipulate the grand jury investigation to obtain evidence useful in civil litigation; and (3) civil disclosure increases the number of persons privy to grand jury matters thereby increasing the risk of inadvertent or illegal disclosure to others. *Id.* at 3142, 43. The IRS's participation in the grand jury investigation in this case achieved each of these illicit purposes.

As noted by Judge Winner, the genesis of the grand jury's inquiry was a belief by the IRS that it could not effectively investigate the facts underlying the subject

tax shelters pursuant to its congressionally circumscribed administrative enforcement powers. Thus, the extraordinary powers of the grand jury were sought and usurped.

(2) *Rule 6(e)(2)—Secrecy Violations*

Rule 6(e)(2), Fed.R.Crim.P. provides:

> (2) General Rule Of Secrecy.—A Grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Rule 6(e)(2) is a codification of the traditional requirement that matters occurring before the grand jury should be treated as confidential. Courts have consistently recognized that this traditional requirement exists to no small degree in order to protect the name and reputation of the targets during the pendency of the period the allegations are being investigated. *See e.g., United States v. Malatesta*, 583 F.2d 748, 752 (5th Cir.1978), *cert. denied*, 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979). Thus, courts have held that Rule 6(e) prohibits the government from publicly identifying the targets of a grand jury's inquiry. *See In re Bart*, 304 F.2d 631, 637 n.19 (D.C.Cir.1962); *Hawthorne v. Director of Internal Revenue*, 406 F.Supp. 1098, 1128-29 (E.D.Pa. 1975).

During the course of this investigation the government repeatedly and systematically disclosed the identity of the targets to individuals and entities that the government acknowledged had a "business relationship" with the targets and to investors identified as customers of the targets. These numerous disclosures adversely affected the business activities of the targets at a time when the grand jury was charged with investigating whether any crimes may have been committed. The abuse of power is evident.

The violations of Rule 6(e)(2) do not end with the improper violations of the secrecy requirements. In order to gain a tactical advantage, prosecutors selected two witnesses and directed them not to disclose the fact or substance of their testimony. As Judge Winner held, this was done in direct contravention of Rule 6(e)(2):

> [The imposition upon witnesses of secrecy obligations] is now verboten because of the language of the rule saying, 'No obligation of secrecy may be imposed on any person except in accordance with this rule.' This language has been uniformly interpreted to prohibit any instruction to a witness that his testimony is secret. *In re Langswager*, (1975) D.C. Ill. 392 F.Supp. 783; *In re Grand Jury Witness Subpoenas* (1974) D.C.Fla. 370 F.Supp. 1282; *In re Alvarez* (1972) D.C.Cal. 351 F.Supp. 1089; *In re Minkoff* (1972) D.C.R.I. 349 F.Supp. 154; *In re Investigation before April 1975 Grand Jury* (1976) D.C.Cir. 531 F.2d 600; *In re Vescovo Special Grand Jury* (1979) 473 F.Supp. 1335, and many other cases. In spite of this express command of Rule 6(e), secrecy obligations were imposed on several witnesses, and, to make the violation more disturbing, secrecy obligations were imposed on lawyers called to furnish information concerning their clients. That makes the violation gravely beyond the pale, because of the impossible position the lawyer-witness is placed in, but that's what the grand jury transcript discloses. No 'oath' of secrecy was adminis-

tered, but an obligation of secrecy was imposed by instructions from government counsel to witnesses. This foolishness may or may not have been intentional, but ignorance of the law is not a defense available to a prosecutor. *This misconduct is established by the record, and it will prove difficult for the government to deny,* just as the government had to admit the attempted administration of an 'oath' by Mr. Snyder. The government surprisingly defends the proven mishmash of functions of the IRS Special Agent/Grand Jury Agents/Assistants to the Attorney for the Government appointed under Rule 6(e), but maybe it thinks that admitting that this was error would confess the motion to dismiss.

575 F.Supp. at 331, 332 (1983); *see also United States v. Radetsky*, 535 F.2d 556, 569 (10th Cir.), *cert. denied*, 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976); *Application of Eisenberg*, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981); *In re Russo*, 53 F.R.D. 564, 570 (C.D.Ca.1971); *In Re Disclosure of Evidence*, 184 F.Supp. 38, 41 (E.D. Va.1960); *Arlington Glass Co. v. Pittsburgh Plate Glass Co.*, 24 F.R.D. 50, 52 (N.D.Ill.1959).

As Judge Winner suggests, the only issue that could not be determined by the record before him was whether the secrecy obligations were imposed intentionally. The prosecutor's testimony during the hearings before me, however, leaves no doubt that the improper obligation was imposed deliberately, with full knowledge of the witness's relationship to the targets and in violation of the commands of the United States Attorneys' Manual.[20]

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[20] The United States Attorneys' Manual provides at § 9-11.362:

> Rule 6(e) specifically prohibits any obligation of secrecy from being imposed 'upon any person except in accordance with this rule.' Witnesses, therefore, cannot be put under any obligation of secrecy. *Application of Eisenberg*, 654 F.2d 1107, 1113 n. 9 (5th Cir. 1981). This, however, should not prevent the grand jury foreman from requesting a witness not to make unnecessary disclosures when those disclosures or the attendant publicity might hinder an investigation.

Moreover, no legitimate explanation for the activity was ever presented.

The numerous violations of Rule 6(e) by the Department of Justice attorneys ignore the rights of uninjected subjects of an investigation and the secrecy and independence of the grand jury itself. As I shall discuss later, a court's supervisory power to dismiss an indictment is appropriately utilized to ensure that governmental impropriety of a similar nature is not repeated in future investigations or prosecutions. *United States v. Owen*, 580 F.2d 365, 367 (9th Cir.1978); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir.), *cert. denied*, 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 120 (1977). Dismissal is particularly appropriate in order to hold all government prosecutors acting within this district to the same high standard of conduct that the United States Attorney demands of his own assistants. *United States v. Jacobs*, 547 F.2d 772, 778 (2d Cir.1976) (Organized Crime Strike Force attorney operating in the Eastern District of New York); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) (Environmental Protection Agency Staff attorney appointed as Special Attorney in the Department of Justice); *see also United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir.1972).

As previously indicated, however, I hold that where violations of Rule 6(e) are intentional or reckless and systemic, the sanction of contempt is insufficient and dismissal of the indictment is warranted. Under such circumstances, it is not necessary for the defendant to show that he has been prejudiced by the violations. In the instant case, however, such showing of prejudice has been convincingly made.

C. Violations of Witness Immunity Statutes

Earlier in this opinion,[21] I indicated that I believe I was unduly diffident in describing so-called pocket immunity or "Letters of Assurance" as a "damnable practice." I believe I was wrong because I did not then have the benefit of the Supreme Court's opinion in *United States v. Doe*, —— U.S. ——, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984).

In *Anderson v. United States*, *supra*, I wrote:

> The government, in this case, made extensive use of informal or 'pocket' immunity granted to a witness by letter or oral representation of the prosecutor rather than ordered by a judge after satisfaction of the procedures of 18 U.S.C. §§ 6002 and 6003. Such immunity poses serious problems since it circumvents the statute and leaves an inadequate record of the scope of the immunity granted. *See, United States v. Quatermain, Drax*, 613 F.2d 38 (3rd Cir. 1980). The procedures established by Congress in 18 U.S.C. §§ 6002 and 6003 clearly indicate an intent to formalize, standardize and limit the use of immunity. The statute requires approval of a senior Justice Department official as well as application to and order of a United States District Court Judge before immunity is conferred. The procedure leaves no doubt as to the accomplishment of the grant, the particularized need of the witness and the scope of the immunization. It also leaves for Congress and the public a complete and definite record of the frequency, efficacy and reasons for the use of immunity. Informal immunity, apparently in widespread use by the Justice Department, accomplishes none of those goals. It is a damnable practice. No notice need be given to senior Justice Department officials or to a judge. The only record, if any, is a letter by the U.S. Attorney or a transcript of an oral representation, if it was made on the record. Such informality has resulted in confusion over witnesses rights in the past, *Quatermain, Drax, supra*, 613 F.2d 38, and lends itself to excessive use of unchecked discretion. While the immunity grant is always a matter of prosecutorial discretion, the procedures of §§ 6002 and 6003 subject it to the light of public, congressional and judicial scrutiny and insure that it is not invoked or revoked arbitrarily or capriciously.

[21] *See supra* note 13.

In *United States v. Doe*, Justice Powell wrote:

> As we stated in *Pillsbury Co. v. Conboy*, 459 U.S. 248, 74 L.Ed.2d 430, 103 S.Ct. 608 (1983), in passing the use immunity statute, 'Congress gave certain officials in the Department of Justice exclusive authority to grant immunities.' *Id.*, at 253, 74 L.Ed.2d 430, 103 S.Ct. 608 [at 612]. 'Congress foresaw the courts as playing only a minor role in the immunizing process: . . .' *Id.*, at 254, n.11, 74 L.Ed.2d 430, 103 S.Ct. 608 [at 613]. The decision to seek use immmunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation. *See United States v. Mandujano*, 425 U.S. 564, 575, 48 L.Ed.2d 212, 96 S.Ct. 1768 [1776] (1976) (plurality opinion). Congress expressly left this decision exclusively to the Justice Department. If, on remand, the appropriate official concludes that it is desirable to compel respondent to produce his business records, the statutory procedure for requesting use immunity will be available.

—— U.S. at ——, 104 S.Ct. at 1244-45, 79 L.Ed.2d at 562-63.

It thus can be seen most clearly that Congress has vested exclusive authority to grant immunities in a few specified officials in the Department of Justice. Further, Congress has clearly and unequivocably set forth the parameters within which that discretion must be exercised. Ordinary statutory construction employing the principle of *expressio unius est exclusio alterius* and buttressed by the quoted language of Justice Powell leads to only one conclusion: Pocket immunity is illegal; when granting immunity, the Department of Justice must comply with the requirements of 18 U.S.C. §§ 6002 and 6003.

I hold that the repeated use of letters of assurance or so called "pocket immunity" in the instant case violated the applicable statutes and tainted the grand jury indictment with its illegality.[22]

D. Violations of the Fifth Amendment

Courts have consistently held that it is improper to call a witness solely for purposes of having that witness assert their rights under the Fifth Amendment when the prosecutor is aware of the witnesses' intention to do so. *See Namet v. United States*, 373 U.S. 179, 186, 83 S.Ct. 1151, 1154, 10 L.Ed.2d 278 (1963); *United States v. Ritz*, 548 F.2d 510, 521 (5th Cir. 1977); *United States v. Maloney*, 262 F.2d 535, 537-38 (2d Cir. 1959). The facts here demonstrated that the prosecutor hoped to take advantage of impermissible inferences that arise from invocation of the privilege. *See United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959). The prosecutor's

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[22] The conventional remedy for illegal use of "pocket immunity" would, in most instances, take the form of a *post facto* grant of statutory immunity or the equitable enforcement of the pocket agreement, for the benefit of grand jury witnesses who relied on the prosecutor's promises. These concerns are not before me here. Still, the use of pocket immunity was so pervasive in this case that it reflects upon the general conduct of the prosecutors and the grand jury.

ploy "served no other purpose than calculated prejudice." *United States v. Samango*, 607 F.2d 877, 883 (9th Cir. 1979).

Moreover, the improper efforts to prejudice the defendants by impermissible inferences flowing from the seven witnesses' assertions of their privilege against self-incrimination was compounded by the questioning concerning the payment of the witnesses' legal fees. No legitimate purpose for such questioning exists. Indeed, siimlar questioning before a grand jury has been held to be improper. *United States v. Gold*, 470 F. Supp. 1336, 1352 (N.D. Ill. 1979).

Dismissal of an indictment is not required *per se* by the deliberate contriving of a prosecutor to have witnesses invoke their Fifth Amendment privilege. Such conduct is, however, a factor to be considered in the totality of circumstances in determining whether a grand jury has been overreached or usurped.

E. Presentation of Misinformation

The mischaracterization of the testimony before the grand jury and the unidentified use of questionable hearsay information with regard to vital issues intrudes upon the independent role of the grand jury. *See United States v. Samango*, 607 F.2d 877 (9th Cir. 1979). The court in *Samango* emphasized that such behavior, even if unintentional, causes "improper influence and usurpation of the grand jury's role." *United States v. Samango*, 607 F.2d at 882. Such a danger is particularly present where, as here, the misrepresentations could not be expected to be readily apparent to the second grand jury and related to material issues in the prosecution. *See id.* at 883; *United States v. Lawson*, 502 F. Supp. 158 (D. Md. 1980) (indictment dismissed where prosecutor's examination of witness created a false impression and misled grand jurors as to nature of the evidence); *United*

States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975) (indictment dismissed where grand jurors misled as to hearsay nature of testimony and misstatements).

F. Violations of the Sixth Amendment

It is beyond cavil that, upon indictment, a defendant becomes an "accused" with a right to counsel guaranteed by the Sixth Amendment. *See Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). The guarantees of the Sixth Amendment apply to corporate defendants with the same force as to individual defendants. *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979); *see also Grandbouche v. Adams*, 529 F. Supp. 545, 547 (D. Colo. 1982). In order to give meaning to these guarantees, the Supreme Court has held that once a defendant becomes an accused, it is improper for a government official to question that defendant out of the presence of counsel. *Brewer v. Williams, supra*; *Massiah v. United States, supra.*

In the instant case, the Department of Justice engaged in precisely the type of interrogation proscribed by the Supreme Court.[23] Without notifying counsel for

[23] The prosecutor's *post hoc* rationalizations attempting to demonstrate the propriety of his conduct do the opposite. *See supra* text accompanying note 18. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) establishes that corporate employees of the kind interrogated here fall within the ambit of the attorney-client relationship and must be considered, in essence, the corporation for purposes of communications. Indeed, while the Supreme Court in *Upjohn* noted that instead of procuring interview notes of the corporation's attorneys, counsel for the government might themselves question employees about relevant events, the facts of that decision give no indication that questioning would be proper if conducted behind counsel's back. Rather, the opinion indicated that questioning would occur with appropriate procedural safeguards. Moreover, *Upjohn* was not a criminal case and the corporation had not been indicted. Thus, *Massiah* and its progeny, of course, were inapplicable. Indeed, the facts and relevance of *Upjohn* are so inapposite as to raise questions as to the sincerity of its invocation.

The prosecutor also relied upon *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) as support for its position. That case too dealt with civil litigation and the question of attorney client privilege with a corporate client. The case did not concern post-indictment activity by prosecutors.

The prosecutor's second *post hoc* rationalization that *Massiah* did not restrict his interrogation because he did not employ subterfuge requires little discussion. The Supreme Court did not base its holding in *Massiah* upon the use of subterfuge. Rather, that opinion was premised on an accused's right to counsel. Thus, in *Brewer v. Williams*, the Supreme Court specifically noted that the fact that "the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant." *Brewer v. Williams*, 430 U.S. at 400, 97 S.Ct. at 1240.

the indicted bank, the prosecutor along with a federal agent, impermissibly interrogated several high level bank employees in hopes of obtaining incriminating information. In several respects the instant conduct is even more egregious than that which occurred in *Brewer* and *Massiah*. The prosecutor's actions here were premeditated and prompted by the expectation that the worst that would become of his constitutional violations would be a limited suppression of evidence.[24]

[24] Unlike the situations in *Brewer* and *Massiah*, the interrogation of the bank's representatives was conducted not by an investigatory agent, but primarily by an attorney involved in the prosecution also calling into question a possible violation of that attorney's ethical obligations.

Disciplinary Rule 7-104 of the Code of Professional Responsibility provides in relevant part:

> *Communicating With One of Adverse Interest.*
>
> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior

The defendants have not, however, demonstrated any prejudice from the interrogations of bank employees in the absence of counsel. The bank's counsel has performed ably and adequately throughout the litigation. Under such circumstances, the Supreme Court has specifically rejected the remedy of dismissal based upon a prosecutor's violation of a defendant's Sixth Amendment rights. "[A]bsent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). *See also United States v. Drake*, 655 F.2d 1025, 1027 (10th Cir. 1981); *United States v. Kapnison*, 743 F.2d 1450 at 1454 (10th Cir. 1984. As in *Morrison*, so it is here:

> [Defendant] has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of [its] counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that [defendant] has been effectively represented. . . .

449 U.S. at 366, 101 S.Ct. at 669. Accordingly dismissal of the indictment is an inappropriate remedy for the *Massiah* violations in this case.[25]

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consent of the lawyer representing such other party or is authorized by law to do so.

See United States v. Thomas, 474 F.2d 110, 111-12 (10th Cir.), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973). *Cf. Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975).

[25] The prosecutor's interrogation and surveillance here is precisely the type of deliberate governmental impropriety that should be discouraged. *See United States v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978), *citing Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir. 1977), *cert. denied* 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 120. Insofar as the prosecutor by his own admission was not deterred by the possibility of other available remedies, dismissal remains the only viable prophylactic tool. The Supreme Court has gone to great lengths to explain that the good faith efforts of law enforcement officials should not be overcome by technicalities beyond their control. *See United States v. Leon*, —— U.S. ——, 104 S.Ct. 3430, 82 L.Ed.2d 677 (1984). The apposing proposition requires that effective sanctions be imposed to prevent deliberate constitutional violations by law enforcement officials. Constitutional protections are of little value if violations are permitted without the imposition of meaningful sanctions. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961); *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). Here, the prosecutor's premeditated interrogation of bank employees behind the back of the bank's counsel plainly violated the Sixth Amendment protections outlined by the Supreme Court in *Massiah* and *Brewer*.

The Sixth Amendment abuses were, in some instances, undertaken by the prosecutors appearing before the grand jury. Thus, while not directly implicating actions by the grand jury, such actions do reflect upon the general abuses of the grand jury process practiced by the government. The *Massiah* violations must enter into my general qualitative assessments of the prosecutors' and grand jury's conduct.

G. The Totality of Circumstances Test

As I stated in *United States v. Anderson*, 577 F.Supp. 223, 230 (1983):

> The Tenth Circuit Court of Appeals has recently articulated the standard to be applied in cases where dismissal of an indictment is sought because of prosecutorial misconduct:
>
> > An indictment may be dismissed for prosecutorial misconduct which is flagrant to the point that there is some significant infringement on the grand jury's ability to exercise independent judgment.

United States v. Pino, 708 F.2d 523, 530 (10th Cir. 1983). While the remedy of dismissal is extraordinary, it may be used 'to insure proper standards of conduct by the prosecution.' 708 F.2d at 530. District courts are also empowered to dismiss indictments because of inherent supervisory powers which protect the integrity of the judicial system. 708 F.2d at 531. Isolated errors and improprieties do not require dismissal of the indictment. It is only when the government engages in deliberate conduct which interferes with the grand jury's independent function or damages the integrity of the judicial process that the remedy of dismissal becomes necessary. Because I find that the government engaged in a pattern of conduct calculated to infringe the grand jury's ability to exercise independent judgment, the indictments must be dismissed.

• • • • • •

The grand jury is more than a symbol of the limitations the constitution places on the government's power. When the government usurps the grand jury and destroys its independence so that it looks and acts like an arm of the prosecution, the very essence of a government of limited powers is destroyed. *See, United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973); *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).

In *United States v. Samango*, the Ninth Circuit said:

> The Court's power to dismiss an indictment on the ground of prosecutorial misconduct is frequently discussed but rarely invoked. Courts are rightly reluctant to encroach on the constitutionality-based independence of the prosecutor and grand jury. [26]

[26] In almost seven years on this bench this case and *United States v. Anderson, supra*, are the only two instances out of many cases in which I have felt constrained to dismiss an indictment.

> The Court 'will not interfere with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process.' *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.), *cert. denied*, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978).

Nevertheless:

> On occasion, and in widely-varying factual contexts, federal courts have dismissed indictments because of the way in which the prosecution sought and secured the charges from the grand jury. . . . These dismissals have been based either on constitutional grounds or on the court's inherent supervisory powers. . . . Whatever the basis of the dismissal, however, the court's goal has been the same, 'to protect the integrity of the judicial process,' . . . particularly the functions of the grand jury, from unfair or improper prosecutorial conduct. (citations and footnotes omitted.)

607 F.2d at 881 quoting *United States v. Chanen*, 549 F.2d 1306, 1309 (9th Cir.) *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977).

From the inception of the twenty-month grand jury investigation when the prosecutors divined the office of "agent of the grand jury" on the IRS agents through the time of the agent's improper "summaries" presented shortly before the indictment was returned, the conduct of the Department of Justice attorneys substantially undermined the ability of the grand jury to exercise independence. The numerous abuses and violations of rules and constitutional principles must be considered particularly serious because of the admissions in these hearings that, for the most part, the activity was undertaken knowingly and purposefully.

In addition to the abuses detailed in this memorandum opinion numerous other instances of misconduct are re-

counted by Judge Winner in his August 25, 1983 Opinion. In sum, the substantial departures of prosecutors in this case from established notions of fairness, from clearly articulated rules of law, from specific rules of procedure and, indeed from the Department of Justice's own manual and operating directives constitute systematic and pervasive overreaching. There is no doubt that the indicting grand jury was usurped and that time-honored constitutional principles were sullied.

Some of the violations, standing alone, require dismissal. Others, while not singularly requiring dismissal, when combined with one another amount to travesty. What is perhaps most alarming is that even in the very last of so many hearings, one of the prosecuting attorneys continued to refer to the challenge to his and his colleagues' conduct as "silly" and "frivolous." K. Tr. 1137. The supervisory authority of the court must be used in circumstances such as those presented in this case to declare with unmistakable intention that such conduct is neither "silly" nor "frivolous" and that it will not be tolerated.

The government attorneys, who replaced the prosecutors whose activities are at issue, reluctantly acknowledge that with regard to *at least* two of the procedures employed in this investigation they were "technically inaccurate" and "should obviously not be repeated in the future." *See* Government Response to Defendants' Opening Brief in Support of Motions to Dismiss the Indictment, filed November 14, 1983, at pp. 11, 15. When all "the technically inaccurate" procedures and abuses which "should obviously not occur in the future" are accumulated, what emerges is a picture of an IRS investigation out of control and a grand jury which was converted into little more than a rubber stamp.

The Fifth Amendment guarantees that no person shall be held to answer for an infamous crime "unless on a

presentment or indictment of a grand jury." The Supreme Court observed in *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-773, 35 L.Ed.2d 67 (1973) that "[t]his constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252, whose mission is to clear the innocent, no less than to bring to trial those who may be guilty." As a result of the conduct of the prosecutors and their entourage of agents, the indicting grand jury was not able to undertake its essential mission. That such is a significant and prejudicial deprivation of these defendants' constitutional rights to due process of law and personal liberty should require no further recitation of authority.

ORDER

Based on the foregoing I hold and ORDER as follows:

1. The indictment is dismissed because of the numerous violations of Rule 6(d), Fed.R.Crim.P.

2. The indictment is dismissed because of the numerous violations of Rule 6(e), Fed.R.Crim.P.

3. The indictment is not dismissed solely for the use of "pocket immunity" in contravention of 18 U.S.C. §§ 6002 and 6003.

4. The indictment is not dismissed solely for violations of the Fifth Amendment to the United States Constitution.

5. The indictment is not dismissed solely for the knowing and deliberate presentation of misinformation to the grand jury.

6. The indictment is not dismissed solely for violations of the Sixth Amendment to the United States Constitution.

7. The indictment is dismissed because of the totality of the circumstances which include numerous violations of Rule 6(d) and (e), Fed.R.Crim.P., violations of 18 U.S.C. §§ 6002 and 6003, violations of the Fifth and Sixth Amendments to the United States Constitution, knowing presentation of misinformation to the grand jury and mistreatment of witnesses.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 84-1231, 83-2284

THOMAS D. BLONDIN, JARED J. SCHARF, and STEVEN L. SNYDER,
Petitioners,

v.

HONORABLE FRED M. WINNER, UNITED STATES DISTRICT JUDGE for the DISTRICT OF COLORADO,
Respondent.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WILLIAM A. KILPATRICK,
Defendant-Appellee.

July 20, 1987

Francis J. Blanchfield, Jr. of Johnson & Blanchfield, P.A., Charlotte, N.C., for petitioners.

Denis H. Mark of Waller, Mark & Allen, P.C. (William C. Waller, on the brief), Englewood, Colo., for defendant-appellee.

Glenn L. Archer, Jr., Asst. Atty. Gen., and Michael L. Paup, Robert E. Lindsay, and Alan Hechtkopf, Attorneys, Tax Div., Dept. of Justice, Washington, D.C., submitted a brief for plaintiff-appellant.

Lawrence W. Treece of Bender & Treece, P.C., Denver, Colo., submitted a brief for amicus curiae American Civil Liberties Union Foundation of Colorado.

Leonard B. Boudin of Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., New York City, submitted a brief for amicus curiae Nat. Emergency Civil Liberties Committee.

Before HOLLOWAY, Chief Judge, SEYMOUR, Circuit Judge, and BOHANON,* District Judge.

SEYMOUR, Circuit Judge.

These cases arise from a federal district judge's publication of a memorandum opinion and his subsequent refusal to withdraw it or to delete from it information identifying three Justice Department attorneys. In case number 83-2284, *United States v. Kilpatrick*, the Government appeals the order denying its motion to withdraw or modify the opinion, and in the alternative seeks a writ of mandamus. Case number 84-1231, *Blondin v. Winner*, is an original action by the three individual attorneys requesting mandamus relief. We conclude that the district court order is not appealable and that petitioners have not shown that they are entitled to an extraordinary writ.

I.

BACKGROUND

A chronology and description of these convoluted proceedings is essential to our discussion of the arguments presented to this court. On September 30, 1982, after

* Honorable Luther L. Bohanon, Senior District Judge, Western District of Oklahoma, sitting by designation.

an extensive investigation of tax shelters set up by William Kilpatrick, a federal grand jury returned a twenty-seven count indictment against Kilpatrick, six other individuals, and the Bank of Nova Scotia. Twenty-six of the counts charged Kilpatrick and others with conspiracy, mail fraud, and/or tax fraud. Count twenty-seven charged Kilpatrick with obstruction of justice. Steven Snyder and Thomas Blondin, attorneys with the Tax Division of the Justice Department, had presented the evidence to the grand jury. Jared Scharf, another Tax Division attorney, had been involved in the investigation before and after the indictment was filed.

On February 21, 1983, Judge Kane dismissed the first twenty-six counts for failure to state a crime, and the Government appealed. In May 1983, with Judge Winner presiding, Kilpatrick was convicted by a jury on count twenty-seven. Snyder, Blondin, and Scharf prosecuted the case.

Kilpatrick filed post-trial motions for a new trial and for dismissal of the indictment on the basis of prosecutorial misconduct by Snyder, Blondin, and Scharf in the grand jury proceedings and after indictment. Hearings on these motions were held before Judge Winner July 12 through July 15. The Government was on notice long before the July hearing that the testimony of Snyder, Blondin, and Scharf was necessary to resolve the allegations of prosecutorial misconduct. The record also indicates that Judge Winner repeatedly expressed his concern to these three attorneys that they could not ethically continue to represent the Government in a proceeding in which they were required to testify. Nonetheless, when the hearing began, Scharf appeared for the Government.[1] Upon questioning by the court, Scharf refused to withdraw, telling the court that the Justice Department at-

[1] Thomas Blondin was also present but the Government had apparently conceded that he could not appear on its behalf.

torney from Washington who would subsequently represent the Government was not yet familiar enough with the case to be competent. Although Scharf actively participated in the taking of testimony the morning of July 12, following the lunch break he announced that he could no longer represent the Government. The court pointed out that Scharf had known about the problem for quite some time, and that witnesses had been called and time had been set aside. Consequently, the court decided to continue taking evidence. However, the court also stated that the Government would be allowed transcripts of the testimony and would be permitted to recall witnesses for cross-examination.

During the proceedings that afternoon, a local assistant United States attorney, who was apparently present at the proceedings in an unofficial representative capacity, appeared for the Government to point out to the court that a witness who had testified was still in the courtroom and to request that he be sequestered. Defense counsel then asked whether a motion to sequester had been made. The court responded that if the Rule had been invoked, it would apply to all witnesses, including the three Tax Division attorneys. The Government did not object to this ruling and the Tax Division attorneys were excluded, although Blondin was allowed to remain as the advisory witness for the Government. The court subsequently pointed out that the sequestered attorneys were precluded from reading the transcripts of testimony taken while they were not permitted to be present.

The following day, July 13, the Government was represented by the replacement attorney from the Justice Department and the hearing continued.[2] On July 14, the district judge stated that he wanted Snyder put on and

[2] Contrary to petitioners' assertion in their brief, the record reveals that no testimony was taken that day until the replacement counsel arrived.

that he would run nights and Saturday if necessary. Rec., vol. 7, at 394. The judge later repeated his desire to hear testimony from Snyder and Scharf promptly to learn their version of what had happened. *Id.* at 630. The Government attorney responded that he was not ready to put them on and implied that he would be ready in mid-August when the hearings were scheduled to resume. *Id.* at 630-32. On July 15, the court commented on the nature of the evidence and again encouraged the Government to put on these witnesses. Rec., vol. 8 at 787. The hearing was then recessed until August 16, 1983.

On August 8, at defendants' request, this court partially remanded the appeal of the dismissal of the first twenty-six counts of the indictment to permit the district court to consider whether all the counts should be dismissed on the basis of prosecutorial misconduct. When the hearing recommenced on August 16, the judge stated that, in view of the partial remand and his imminent retirement from the bench, he would not be able to rule on the motion to dismiss. He also stated that he intended to write a memorandum opinion on the proceedings thus far to aid the district judge who would ultimately decide the issue. Rec., vol. 9, at 869. The judge reiterated that he planned "to write a memorandum summarizing, without ruling on anything having to do with the motion to dismiss, but summarizing the positions of the parties, the accusations that are made, and the denials that are made to those accusations." *Id.* at 874. When the Government indicated that it would not put on Snyder or Blondin,[3] the court again recommended that they testify, observing that their testimony was vital and that their absence "casts the entire thing in a poor light." *Id.* at 994.

[3] Jared Scharf had been called as a witness by Kilpatrick and cross-examined by the Government on July 15.

On August 17, the judge again expressed his desire to hear Snyder's testimony, pointing out that although he wanted to write a reasonably complete memo, the memo could only be based on the testimony presented. Rec., vol. 10, at 1209. The Government attorney stated that he understood and would not expect anything else, but nonetheless did not call Snyder as a witness. The court then pointed out that because Snyder and Blondin were both in Denver, taking their testimony at that time would be efficient. *See id.* at 1210. Finally, in response to a question by the Government attorney, the judge clearly indicated that the memorandum he was going to write would likely be for publication. *See id.* at 1269.

The district judge did write a published memorandum opinion in which he granted Kilpatrick's motion for a new trial, described the evidence presented on the issue of prosecutorial misconduct, and ordered that the transcripts of the grand jury proceedings be made available to defense counsel. *See United States v. Kilpatrick*, 575 F.Supp. 325 (D.Colo.1983). That opinion has generated the cases presently before this court. Following publication of the opinion and the district court's refusal to withdraw or amend it, the Government filed its appeal/petition and sought emergency relief in this court pending our decision on the merits. After delaying action on the Government's emergency motion long enough to give the other parties time to respond, we denied emergency relief on January 24, 1984.

A ten-day hearing on defendants' motion to dismiss the entire indictment for prosecutorial misconduct was subsequently held before Judge Kane. In a published opinion, Judge Kane dismissed the indictment, referring to much of the same evidence that had been set out in Judge Winner's memorandum. *See United States v. Kilpatrick*, 594 F.Supp. 1324 (D.Colo.1984). The Government appealed. This court reversed, concluding that although misconduct had occurred, it had not affected the

independent judgment of the grand jury, and that such an effect was a prerequisite to dismissal. *See United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir.1987).

II.

APPEALABILITY

This court has jurisdiction to hear appeals from final decisions of the district court. *See* 28 U.S.C. § 1291 (1982). "To be final and appealable, the district court's judgment must end the litigation and leave nothing to be done except execute the judgment." *First Bank v. Albuquerque Nat'l Bank (In re Glover)*, 697 F.2d 907, 909 (10th Cir.1983). Although recognizing that the order at issue here does not end the litigation, the Government nonetheless contends that the decision is appealable because it is a collateral order within the meaning of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978). The Supreme Court has cautioned that the collateral order doctrine "is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985).

Assuming that the district court's order finally determined the publication and content of its opinion, and even assuming solely for argument that the *propriety* of the court's recitation of and comments on the evidence is an issue completely separate from the merits, we can-

not say that "denial of immediate review would render impossible any review whatsoever." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376, 101 S.Ct. 669, 674, 66 L.Ed.2d 571 (1981) (quoting *United States v. Ryan*, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971)). It is the content of the opinion that is at the heart of this appeal. However, the opinion clearly stated that the record to date was incomplete, that the court was making no findings on the asserted prosecutorial misconduct, and that additional hearings in district court on the issue would be forthcoming. Such a preliminary recitation of allegations and evidence is by its nature subject to review and correction through later proceedings. We therefore conclude that the order is not appealable under *Cohen* and its progeny.[4]

III.

MANDAMUS

In the alternative, the Government and the individual petitioners assert that they are entitled to a writ of mandamus. "[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S.Ct. 188, 189, 66 L.Ed.2d 193 (1980). To ensure that the writ is issued only in exceptional cases, the Supreme Court requires that a party seeking this relief "have no other adequate means to attain the relief he desires" and show that his "right to issuance of the writ is 'clear and indisputable'". *Id.* at 35, 101 S.Ct. at 190 (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379,

[4] We note that, in a related context, the Supreme Court has held that an attorney's interest in immediate vindication of an alleged erroneous finding of misconduct is insufficient to establish the appealability of an interlocutory order. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 432-35, 105 S.Ct. 2757, 2762-63, 86 L.Ed.2d 340 (1985) (order disqualifying counsel in civil case not immediately appealable).

384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953)); *see also Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654 (10th Cir.1984).

Petitioners here have failed to offer any ground upon which their right to relief is clear and indisputable. They contend that they were denied due process because they were not forwarned that they should put on evidence. This assertion is flatly contradicted by the record, which establishes that the district judge repeatedly sought testimony from the attorneys who are petitioners here, told Government counsel numerous times that he would write a memorandum setting out the evidence presented, and stated that his opinion would likely be published. Petitioners also assert due process denials arising from the Government's alleged inability to cross-examine some witnesses effectively and from the sequestration order. As set forth in Part I, these circumstances were the product of the Government's own actions in the hearings, and the Government made no objection below on these grounds. Indeed, the Government was actually at an advantage by having transcripts of the witnesses' direct testimony to use between the July and August hearings in preparing its cross-examination.

Petitioners also assert that they are entitled to mandamus relief because the district court's discussion of the evidence of prosecutorial misconduct was not relevant to the issues it decided. In its opinion, however, the court ordered disclosure of the grand jury transcripts to defense counsel. The Federal Rules of Criminal Procedure allow the court to permit disclosure "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed.R.Crim.P. 6(e)(3)(C)(ii). The decision to release the transcripts and the determination whether a sufficient showing has been made are matters committed to the trial court's discretion. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223, 99 S.Ct. 1667, 1675,

60 L.Ed.2d 156 (1979; *United States v. Warren*, 747 F.2d 1339, 1347 (10th Cir. 1984). In refusing to amend his memorandum, the judge indicated that he felt the recitation of evidence was necessary to support his decision to order disclosure. When the challenged action is one involving the exercise of discretion, mandamus relief is particularly inappropriate. *See Daiflon*, 449 U.S. at 36, 101 S.Ct. at 190.

Finally, petitioners argue vigorously that they are entitled to the writ because the district court opinion was defamatory.[5] However, the district court specifically stated that it was only setting forth the evidence presented to date, that it was making no findings, and that further proceedings would follow.

> "Because [an] additional hearing is required, I shorten discussion of most of the claims of prosecutorial misconduct, but I shall comment briefly on them. Frequently I will phrase the charges as if the facts had been established, but I emphasize that I am not saying that the facts have been proven. I am just adopting the practice of the government in phrasing an indictment in language saying that thus and so are the facts. I am only phrasing the defendant's charges against the government in the same way the government phrases its charges against a defendant, and the fact that the charges are made is not evidence that they are true, nor do I find that they are."

Kilpatrick, 575 F.Supp. at 332. Thus the memorandum by its own language warns the reader that the opinion

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[5] Petitioners also assert that the district judge was biased and should have recused himself. No motion to recuse was filed below. In any event, petitioners have since obtained the appropriate relief through their subsequent full hearing on prosecutorial misconduct before another judge.

must be read in light of the extent, if any, to which it may be inconsistent with subsequent opinions.

Moreover, asking this court to issue a writ of mandamus directing a district judge to withdraw or to expunge portions of a published opinion raises issues under the First Amendment even more serious than those that prompted this court to deny the Government request for temporary emergency relief. Petitioners have failed to offer any arguments or authorities that adequately dispel the grave constitutional concerns their petition raises. Their right to relief on this ground is hardly clear and indisputable.

At oral argument, counsel for petitioners conceded that petitioners could not ask this court to order the district court to withdraw publication, and instead requested us to issue an opinion commenting on the propriety of the district court's memorandum. Such relief would be essentially indistinguishable from the relief provided by an opinion on the merits after appeal. Petitioners' interest in their reputations was subject to vindication by the contemplated further proceedings, which would necessarily ascertain the validity of the charges and the evidence set out in the memorandum at issue. Simply put, petitioners are not entitled to this mandamus relief for the same reason we have no appellate jurisdiction—the alleged harm from the district court's order was remediable below or on appeal because it was inextricably intertwined with the merits of the alleged prosecutorial misconduct. Mandamus is not appropriate unless the petitioner has "no other adequate means to attain the relief he desires." *Daiflon*, 449 U.S. at 35, 101 S.Ct. at 190.

In sum, petitioners have failed to make a sufficient showing of their right to relief, and we therefore deny the petition for a writ of mandamus. In so doing, we recognize that the feelings of all participants in these proceedings have run high. Those participants would

have been wise had they heeded the counsel offered by Judge Breitenstein in *Lane v. Wallace*, 579 F.2d 1200, 1203 (10th Cir. 1978):

> "[J]udges should be ever mindful of the words of Francis Bacon in his essay on 'Judicature.' . . .
>
> > 'Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. • • •
> >
> > Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well tuned cymbal.'
>
> Expressed in modern parlance, a judge should not talk too much. Bacon also said . . .
>
> > 'And let not counsel at the bar chop with the judge, nor wind himself into the handling of the cause anew after the judge hath declared his sentence • • • • .'
>
> The meaning is that an advocate should not protest too much."

The appeal is dismissed and the petition for a writ of mandamus is denied.

APPENDIX E

UNITED STATES DISTRICT COURT
D. COLORADO

No. 82-CR-222

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM A. KILPATRICK, *et al.*,
Defendants.•

Aug. 25, 1983

William Waller and Richard K. Rufner, Wagner and Waller, Englewood, Colo., for defendant Kilpatrick.

James L. Treece, Treece, Zbar, Webb & Kenne, Littleton, Colo., for defendant Declan O'Donnell.

James Nesland, Ireland, Stapleton & Pryor, Denver, Colo., for defendant Bank of Nova Scotia.

H. Alan Dill, Dill & Dill, P.C., Denver, Colo., for defendant Sheila Lerner.

Linda Surbaugh and Robert Miller for U.S. Atty's. Office, D. Colo., Denver, Colo., and Charles J. Alexander, Dept. of Justice, Tax Div., Washington, D.C., for U.S.

• This opinion which was originally published at 570 F.Supp. 505 was withdrawn from the bound volume on order of the United States Court of Appeals for the Tenth Circuit that further publication be temporarily delayed. The order so providing has now been vacated by the Court of Appeals.

WINNER, District Judge.

This case was started with a multiple count, multiple defendant indictment returned after an investigation spanning the lives of two grand juries. Judge Kane dismissed all except one count, which left a one defendant charge of obstruction of justice case to try. It was prosecuted by three attorneys employed by the Tax Division of the Department of Justice in Washington. The single remaining count of the indictment had absolutely nothing to do with tax law, and the trial could have been handled competently and with aplomb by any assistant United States Attorney living in Denver, but the administrative decision of the Department of Justice was to send three lawyers from the Tax Division to try an obstruction of justice case, a prosecution unrelated to their professed area of expertise.

I mention this fact for one very important reason. Following a jury verdict of guilty, defendant moved for dismissal or a new trial, and the pending dismissal motions rest on accusations of IRS and prosecutorial misconduct during the grand jury proceedings and during trial. There is absolutely no suggestion of any improper conduct on the part of the United States Attorney for the District of Colorado or on the part of any of his assistants. Defense counsel carefully point out that neither they nor their client complain about anything other than acts of the IRS and Department of Justice Tax Division lawyers who ran the grand jury and tried the case. Based upon my review of the record and participation in the trial, I share their view that the Colorado United States Attorney's Office is absolutely blameless in this case so fraught with problems. Also, it should be emphasized that no one is critical of government counsel now handling the post trial motions.

To fully cover all of the headaches of this case would require a volume, and I don't plan to write that book for

reasons which will appear presently. Instead, I shall highlight some of the things which occurred during the investigation and during the trial of the case. But, there are so many things to cover that this opinion won't be short. Many of the accusations are disputed by the accused government counsel and agents, but they are forced to admit a few instances of "mistake", and their denials of facts run contrary to testimony of a large number of witnesses. To accept the testimony of government witnesses at full value would require that I effectively decide that quite a few reputable lawyers and citizens of this community and other communities are guilty of perjury, and I make no such determination. The record made to date is incomplete. A full evidentiary hearing was scheduled, but, as will be explained later, present government counsel was not able to prepare for the first hearing, and the testimony of essential government witnesses was put over for three weeks. It was ordered that a summary of the testimony of government witnesses be furnished in advance of a hearing scheduled some three weeks later. The summary was furnished, but the government witnesses weren't called although I and defense counsel wanted them called. Therefore, at this point, all I have to rely on is the summary of proposed testimony, but the witnesses have not been sworn nor have they been cross examined.

With that, then, I set the stage for some of the bizarre happenings in this case, and I do so by mentioning a frequently quoted case. In 1935, in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314, Justice Sutherland, speaking for a unanimous court, criticized the misconduct of the prosecutor in that case. The prosecutor had injected his personal belief concerning the facts of the case (so did a prosecutor here) and he had unfairly cross-examined witnesses. That which the court said concerning reliance by a jury on a prosecutor's integrity is even more applicable to the reliance of a

grand jury on a prosecutor. As to a prosecutor's duties, the Court said:

> "The United States Attorney is the representative not of an ordinary person to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "*It is fair to say that the average jury, in a greater or less degree, has confidnce that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed . . .*"

Perhaps the thing which disappoints me the most is the forgetfulness of the grand jury itself in going along with having two IRS agents in charge of the IRS investigation sworn as "agents of the grand jury". Yet, I can understand, as Justice Sutherland said in *Berger v. United States*, that grand jurors rely on Justice Department lawyers for their legal advice. They should do this, but because I empanelled the first of these two grand juries, I know what those jurors were told, and I strongly suspect that the second grand jury was told about the same thing. I orally, and on the record, stressed that a grand jury has a duty to protect the innocent and I emphasized that a grand jury is an independent body, separate and apart from investigative

agencies and that grand juries are not an arm of the prosecution but instead, they have a duty to examine the government's case carefully. I didn't tell them that they couldn't appoint IRS agents as their own "agents", because it never occurred to me that there could be such a blurring of the "investigative agency", "prosecuting attorney" and "grand juror" functions. However, I did supply each grand juror with a copy of the recommended instructions to grand jurors authored under the auspices of the Judicial Center, and I urged each grand juror to read the instructions frequently to be sure that they adequately performed their duties. (I now urge that Justice Department prosecutors read them). Those instructions say in important part:

> "You will recall from my earlier remarks that the grand jury developed in England as an entity independent from the king to protect a subject from an unwarranted prosecution. The king could not charge a subject with a serious crime without first submitting evidence and witnesses to a grand jury, which then decided whether to return an indictment against the accused person.
>
> Just as the English grand jury was independent of the king, the federal grand jury under the United States Constitution is independent of the United States Attorney, the prosecutorial agent of the executive branch of the federal government. The grand jury is not an arm of the Federal Bureau of Investigation; it is not an arm of the Internal Revenue Service; just as it is not an arm of the United States Attorney's Office. There has been some criticism of the institution of the grand jury for allegedly acting as a mere rubber stamp approving prosecutions that are brought before it by government representatives. Similarly, you would perform a disservice if you did not indict where the evidence warranted an indictment.

As a practical matter, you must work closely with the government attorneys. The United States Attorney and his assistants will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should receive this assistance.

However, you must remember that you are not the prosecutor's agent. Your role is related to but clearly distinct from that of the government attorneys who will assist you, and it is important that you keep the distinction between the roles clearly in mind. Although you must work closely with the government, you must not yield your powers nor forego your independence of spirit.

These comments are meant to be cautionary in nature. The government attorneys are sincere men and women, and you will develop ordinary human feelings as you work with them during your term of service. If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith efforts in every matter presented by the government. However, it is because you may tend to expect such high quality from the government's agents that there is a potentially grave risk to your independence of thought and action, which may cause you to lapse into reliance when you should be dubious or questioning.

You should also remember that the government attorneys are advocates of the government's interests. They are prosecutors; you are not. While they will usually balance fairly the government's interest against the interest of a citizen's personal liberty, it is your responsibility to ensure that the proper balance is achieevd in every case brought to your attention. You must exercise your own judgment,

and if the facts suggest a different balance than that advocated by the government attorneys, then you must achieve the appropriate balance even in the face of their opposition or criticism."

In the face of these instructions, the grand jury wasn't two minutes into its investigation when one of the Justice Department lawyers personally administered an "oath" to an IRS Special Agent, and that "oath" was:

> "Mr. Mendrop, do you swear to carry out the duties as directed by the Foreman and Members of the Grand Jury, keep all proceedings of matters and documents which are received pursuant to your work with this grand jury secretive?" (sic).

In its brief the government says:

> "The government concedes that Mr. Synder had no authority to administer oaths to agents. However, Mr. Snyder will testify, and the record will reflect, that the agents were first given an oath by the foreman. It was only after they had been sworn in by the foreman that Mr. Snyder gave the agents what purported to be an additional oath directing the agents to maintain secrecy."
>
> [As has been noted, this testimony hasn't been presented yet, and on the sworn record made to date, it is not clear who gave an oath to testify truthfully.]

The government then "quotes" from the transcript which shows that those were the facts. That's not what the transcript which was supplied to me shows, and I am concerned about the validity of someone's transcript. It is true that other "oaths" administered by Mr. Snyder do appear to have followed an oath administered by someone to testify truthfully, but if any such oath was administered to Mr. Mendrop at the first session, it doesn't show up in my copy of the transcript.

Six months later, the Special Agents of the IRS were each sworn as an "agent" of the second grand jury, and if there could be any doubt as to the mingling of the investigative agency/prosecutorial/grand jury functions, the hash which results from the following proceedings eliminates that doubt. After a statement by government counsel that he wanted the agent sworn as an "agent of the grand jury", this job description was furnished by Mr. Snyder:

> ". . . when he interviews people and he looks at this stuff, he is not looking at it so much as a special agent of the criminal investigation division of the Internal Revenue Service, and he is looking at (it) as your agent and he is amendable to you and he is amendable to Rule 6. Do you recall Rule 6, the Grand Jury secrecy?
>
> "*Whta it is, is very, very plain, and it states in what capacity he is operating in this investigation so there is no question about it.*
>
> (The agent was then sworn as a witness by someone, and the transcript continues)
>
> "MR. SNYDER: Do you have the oath to make him a—they don't have the oath. Raise your right hand. Do you solemnly swear that the information and evidence which you receive pursuant to the Grand Jury you will keep secret to yourself *except as provided by the foreman of the Grand Jury* or federal judge? . . . In the course of your *duties as a special agent and also as an agent of a previous grand jury* have you conducted an investigation into the affairs of one William A. Kilpatrick?"

I don't know how it could be any clearer than in Mr. Snyder's eyes, the agent's investigation was a combined IRS and Grand Jury investigation conducted by a single "agent", and, of course, under Rule 6 he was the prose-

cuting attorney's little helper. That isn't what the stock instructions to grand jurors say should be done, and, although the government argues that other grand juries have had agents, it fails to come up with a case approving the practice and it fails to mention any case discussing the blurring of functions. The government relies on *United States v. Cosby*, (1979) 5 Cir., 601 F.2d 754. There, the court itself challenged the practice of appointing an "agent of the grand jury", but it "assumed" that the practice was proper because it reversed the case on other grounds. The opinion cites several cases where "the use of third parties to assist grand juries has been considered and approved," but it is to be noted that those cases were decided before the amendment of Rule 6(e) which makes no mention of grand jury "agents" and which says that disclosure may be made to government lawyers for use in the performance of duty, and to other governmental personnel "as are deemed necessary by an attorney for the government *to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.*" The rule doesn't permit the grand jury to have an "agent", and it categorically says that Rule 6(e) permits disclosure to nonlawyers for the single purpose of assisting the "attorney for the government". The rule doesn't mix up the separate functions of prosecutor and grand jury, and with Rule 6(e) clarified, those functions cannot be blended.

My thoughts on this score are in full accord with those of the Advisory Committee, because its note to the 1972 amendment to Rule 6(e) says:

> "Federal crimes are 'investigated' by the FBI, the IRS, or by Treasury agents, *and not by government prosecutors or the citizens who sit on grand juries.*"

Here, the "Grand Jury Agents" investigated and they testified, all the while being special agents of the IRS, and, as will be detailed later, a government prosecutor "investigated" on the streets of Puerto Rico.

The government concedes the obvious. A lawyer employed by the Tax Division of the Department of Justice can't administer oaths, but, sworn or unsworn, I don't think that an IRS special agent can act in the combined capacity of IRS Agent, "Agent for the Grand Jury" and recipient of grand jury information supplied under Rule 6(e) for the sole purpose of helping out the prosecutor. This is a confusion not of apples and oranges. It is confusing apples, oranges and bananas.

Admitting impropriety in the conduct of counsel, the government's brief argues that the error wasn't serious and that it resulted from good motives of Mr. Snyder. The error may or may not be serious, and I express no opinion as to the gravity of the error. However, the government is playing with fire in arguing that good motive excuses making one's own law. I discussed my thinking of this argument at quite some length in *United States v. Best*, (1979) 476 F.Supp. 34, where I ruled that a belief that blocking some railroad tracks would save the world from nuclear devastation didn't excuse the offense, and the Tax Division has surely heard tax protestors say that their motives in refusing to obey the tax laws are pure as the driven snow. Mr. Snyder's good intentions don't excuse his arrogation of a power he didn't have. And, even if the illegal "oath" doesn't amount to serious error, it started the case downhill on a course of repeated excesses on the part of the prosecution. Good intentions or ignorance of the law don't make those errors go away. The creation of the "office" of grand jury agent is harder to excuse when the impartial jurors' "agent" is a chief investigator of the IRS case against the defendants and is receiving grand jury information under Rule 6(e) only to help out the attorney for the government charged with the supervision of presentation of the government's case to the grand jury.

What has been said thus far, and much of that which is to follow, bear in no way on the trial itself, and,

therefore, those things can't enter into a decision of whether a new trial should be granted. That which took place during the grand jury proceedings and most of that which took place outside the presence of the jury couldn't poison the jury verdict, and these alleged transgressions are argued in support of the motion to dismiss because of prosecutorial misconduct and in support of claimed lack of professionalism of government counsel. Therefore, insofar as possible, I shall try to discuss the arguments bearing on the new trial motion in a separate part of this memorandum.

In a brief filed by trial counsel (not signed by present counsel for the government and not adopted by Colorado's United States Attorney whose typewritten signature does appear) the many acusations were described as "silly", but they aren't either silly or frivolous. Indeed, the brief filed by trial counsel was couched in language far different from that which the court is accustomed to reading. When asked, Mr. Scharf said that higher authority in the Justice Department Tax Division had approved the brief and its phraseology, and that higher authority thought the whole thing was a ploy of defense counsel. If that be so, the lawyers in the upper echelon of the Tax Division have adopted a style of brief writing markedly different from that Justice Department lawyers have filed with this court in the past, and I have had my fair share of experience in dealing with Tax Division lawyers for whose ability and ethics I have the highest regard. And, if the overlords of the Tax Division think this whole mess is just a ploy, I recommend that they take a second look.

Since I started this with the grand jury proceedings, I think that I should continue with them and with matters which occurred during the trial which don't impact on the new trial motion but which are aimed at the dismissal motion and lack of professionalism. I think that the place to start is with Rule 6(e), F.R.Cr.P. itself,

because that is the rule which governs grand juries and it is the rule which was violated here. I quote from Rule 6(e) and I italicize the phrases in that section which are of importance to this case:

"(e) Recording and Disclosure of Proceedings.

"(1) All proceedings, except when the grand jury is deliberating, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. *The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government* unless otherwise ordered by the court in a particular case.

"(2) A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, *an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury* except as otherwise provided by these rules. *No obligation of secrecy may be imposed on any person except in accordance with this rule.* A known violation of Rule 6 may be punished as a contempt.

"(3)(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary *to assist an attorney for the government in the performance of such attorney's duty to enforce criminal law.*

(I don't know how it can be argued that this language permits disclosure to IRS agents to work as "agents for the grand jury" unless it is argued that the grand jury is simply an arm of the prosecutor's office, and if that be the argument, almost 800 years of history is going to have to be forgotten. The document King John signed at Runnymede contains no such concept, nor does our Constitution.)

"(ii) such government personnel *as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty* to enforce federal criminal law.

(It seems pretty clear to me that the IRS agents to whom disclosure was made were hired guns of the prosecutor and the IRS—not of the grand jury.)

"(B) . . . An attorney for the government shall promptly provide the district court, before which was empanelled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made. (The language of the rule is this clumsy.)

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made.

. . . . .

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall

be made in such manner, at such time, and under such conditions as the court may direct."

I first mention something not raised by defense counsel, but defense counsel had no way of knowing anything about it. I found out about it from a scanning of the full file drawer of grand jury transcript. A while back, it was the practice to make grand jury witnesses take an oath of secrecy, and this is still the rule in some state court systems. Because of public outcry, the rule was changed, and, as has been seen, this is now verboten because of the language of the rule saying, "No obligation of secrecy may be imposed on any person except in accordance with this rule." This language has been uniformly interpreted to prohibit any instruction to a witness that his testimony is secret. *In re Langswager*, (1975) D.C.Ill. 392 F.Supp. 783; *In re Grand Jury Witness Subpoenas* (1974) D.C.Fla. 370 F.Supp. 1282; *In re Alvarez* (1972) D.C.Cal. 351 F.Supp. 1089; *In re Minkoff* (1972) D.C.R.I. 349 F.Supp. 154; *In re Investigation before April 1975 Grand Jury* (1976) D.C.Cir. 531 F.2d 600; *In re Vescovo Special Grand Jury* (1979) 473 F.Supp. 1335, and many other cases. In spite of this express command of Rule 6(e), secrecy obligations were imposed on several witnesses, and, to make the violation more disturbing, secrecy obligations were imposed on lawyers called to furnish information concerning their clients. That makes the violation gravely beyond the pale, because of the impossible position the lawyer-witness is placed in, but that's what the grand jury transcript discloses. No "oath" of secrecy was administered, but an obligation of secrecy was imposed by instructions from government counsel to witnesses. This foolishness may or may not have been intentional, but ignorance of the law is not a defense available to a prosecutor. This misconduct is established by the record, and it will prove difficult for the government to deny, just as the government had to admit the attempted administration of an

"oath" by Mr. Snyder. The government surprisingly defends the proven mishmash of function of the IRS Special Agent/Grand Jury Agents/Assistants to the Attorney for the Government appointed under Rule 6(e), but maybe it thinks that admitting that this was error would confess the motion to dismiss.

I come now to other accusations made by defendant and pretty much denied by the prosecutors and IRS agents. I make no finding as to whether most of the charges are proven or unproven, but I do find that as to all assertions made by defendant there is cause for concern that the prosecutor's conduct before the grand jury may require dismissal of the indictment. The accusations are made sincerely; there is some evidence to support all of them, and there is quite a bit of evidence to support some. However, before factual findings can be made, a further hearing permitting participation by all parties interested in the grand jury proceedings is necessary—something which will be explained later. Most importantly, of course, the testimony of government counsel is essential, and it is still missing although all three of the lawyers were in Denver during the last hearing.

Because that additional hearing is required, I shorten discussion of most of the claims of prosecutorial misconduct, but I shall comment briefly on them. Frequently I will phrase the charges as if the facts had been established, but I emphasize that I am not saying that the facts have been proven. I am just adopting the practice of the gove ment in phrasing an indictment in language saying that thus and so are the facts. I am only phrasing the defendant's charges against the government in the same way the government phrases its charges against a defendant, and the fact that the charges are made is not evidence that they are true, nor do I find that they are.

Richard Birchall is a lawyer formerly with the Tax Division who practices in New Jersey and who did some

work for defendant and his company. He was subpoenaed to testify before the grand jury, and he showed up in Denver pursuant to the subpoena. He says that he met Mr. Snyder and the agents in a bar and they downed a few drinks paid for by Mr. Snyder. During this session Mr. Snyder supposedly disregarded the secrecy rules and, having done so, he told Mr. Birchall he was a potential target. He added that there was testimony about a personal relationship of Mr. Birchall's, a comment which was bothersome to the witness because of marital problems of Mr. Birchall. These communications are of a nature (if they were made) designed to bring about hurried cooperation from a witness, and especially from a witness who is a former Tax Division lawyer practicing tax law in the private sector. While in Denver, Mr. Birchall was left in a room with some grand jury transcripts and material lying on a table in plain sight. Mr. Birchall scanned some of the material trying to locate that which dealt with the matters discussed by Mr. Snyder. Perhaps he shouldn't have done this, but this is a matter of morals while grand jury secrecy is a matter covered by Rule 6, and Mr. Snyder was under it, but Mr. Birchall wasn't. Moreover, Mr. Birchall testified that he thought that he was being threatened by Mr. Snyder, and he was reacting to the threats. I pass no moral judgment on what happened because that's not the question to be decided in this case.

This doesn't end the accusations made through Mr. Birchall's testimony. He said that Mr. Snyder tried to persuade him to breach his ethical duty of confidentiality and he attributed to Mr. Snyder a remark that even if the defendant wasn't guilty, the government would "break him" with the cost of the defense. These accusations go to the heart of our system of justice, and it was no ploy on the part of defense counsel to bring the accusations out for public scrutiny.

Professor Roland Hjorth teaches tax law at the University of Washington Law School, and he is a recog-

nized expert who was employed by defense counsel on the recommendation of the professor of tax law at the University of Michigan. At the request of defendant, Professor Hjorth was permitted to testify as an expert before the grand jury. His views of tax law differed markedly from those of Mr. Snyder, who bragged on frequent occasions that he had never taken a course in taxation and knew almost nothing about it. Nevertheless, Professor Hjorth was browbeaten and ridiculed by Mr. Snyder, and some of the conversation so out of place for an ethical prosecutor took place during a recess in the hearing of some grand jurors. The government's post trial brief says as to this breach of ethics and standards of common courtesy:

> "It was poor judgment on the part of Mr. Snyder to carry on a conversation with Professor Hjorth while two grand jurors were present. However, the record fact is that there was no disclosure of Grand Jury material during the conversation."

I'm not so sure about that. The record shows that the argument and ridicule was as to that which Professor Hjorth had testified to, and that persons other than grand jurors could hear the argument. However, even if the government is correct in this statement, the fact is that the argument bégs the real question. Professor Hjorth also testified that as a result of Mr. Snyder's conduct, he would never again appear as an expert witness. Intimidating witnesses by telling them that their testimony disgraces them and implying that the Tax Division of the Department of Justice will take after the witness and will complain to the University of Washington Law School because an expert testified to his expert opinions does no credit to our government. I think that the government's argument in its post trial brief is unconvincing, and, seemingly, the professor's testimony isn't seriously contested. I hope that we haven't gotten to the point that disagreement with the legal concepts of the

IRS provides grounds for attacks by that bureaucracy because sometimes the IRS is wrong. *U.S. v. Sells Engineering* (1983) —— U.S. ——, 103 S.Ct. 3133, 77 L.Ed. 2d 743 and *U.S. v. Baggot*, —— U.S. ——, 103 S.Ct. 3164, 77 L.Ed.2d 785.

Peter Parrish is a former IRS agent who is now employed as an accountant and who worked for defendant. He said that when he responded to a subpoena, he was interviewed by Mr. Blondin and matters which took place before the grand jury were discussed. He also said that the discussions could be heard by outsiders. I don't approve this casual approach to witness interviews, but I think that the incident is picayune. It doesn't deserve discussion.

To further muddle the status of the Special Agent/Grand Jury Agent/Assistant to the Prosecutor matter, letters were written on the letterhead of the United States Attorney for the District of Colorado, and they were signed by the IRS agents with an explanatory line under their signature saying that they were "Special Agents". The letters were authorized by Justice Department attorneys, but they were not authorized by the United States Attorney in Colorado. Apart from the fact that IRS agents who claim to be "agents of the grand jury" shouldn't be using the U.S. Attorney's letterhead, the identity of the persons and the transactions which were under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that. I can't fault the IRS agents for this because the government's brief says as to these singular letters:

> "Mr. Blondin and Mr. Snyder on these occasions asked the agents to send out correspondence and to sign the letters for them, after having the contents of the letter read to them over the phone. On no occasion, did the agents who were acting under the direction and control of Mr. Snyder, Mr. Blondin and

> the United States Attorney's Office sign any such letters without advance authority from the government's attorneys."

The United States Attorney for the District of Colorado has disavowed the letters written on his letterhead, and he has seen to it that this won't happen again.

Thus, the disclosures were made with knowledge of Tax Division lawyers and the IRS agent signatures on U.S. Attorney stationery were approved by them. The government has cited no authority for this novel procedure by which the nature of that which was going on before the grand jury and the identity of a target was certified to in writing on the letterhead of the U.S. Attorney who was not running the investigation. Once more, I attribute no fault to the U.S. Attorney.

In recent years, the use of "pocket immunity" has become prevalent. The phrase, for the benefit of the uninitiated, refers to a practice of ignoring the Congressional mandate as to how immunity can be granted and instead of doing what Congress commands, informally substituting a "deal" struck between a prosecutor and a witness. The enforceability of the side agreement in the federal court is an open question, but I have never heard it even argued that federal pocket immunity applies to a state court prosecution. However, when it is coyly suggested that a lawyer's client is a target of a grand jury inquiry and that the client can escape the range of fire by incriminating himself along with someone else, the carrot proffered by the prosecutor is hard to resist. Not unimportant, of course, is the fact that the pocket immunity need not be included in statistical reports showing the number of immunities granted in federal prosecutions. (These statistics have been of interest to Congress in the past, and I believe that they still are.)

The deal is a good one for both sides, but it skirts the law. It can be granted on a local level by lawyers not

authorized to approve the grant of formal immunity, and no report of its use is required. Formal immunity would have required the approval of the United States Attorney and a designated Assistant Attorney General. But pocket immunity can be granted at the whim of any lawyer running a grand jury, and there is no public record of the side deal. Here, the United States Attorney didn't authorize nor did he approve the immunities. In fact, he didn't know anything about them, although statutory immunity requires his okay.

The history of immunity statutes, colonial, state and federal, is set out in footnotes to *Kastigar v. United States* (1972) 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, and the present immunity statute enacted in 1970 is there discussed, as is the Congressional intent in its enactment. The intent as to the formality of grants of immunity is quite plain. 18 U.S.C. § 6002 effectively recognizes privilege against self-incrimination up to the point "the person presiding over the proceeding communicates to the witness an order issued under this part," to testify. The preliminaries to obtaining such an order are spelled out in 18 U.S.C. § 6003, and they are:

> 1. There must be a request for the order *made by "the United States attorney for such district."*
>
> 2. The request by the United States Attorney for the immunity grant *must then be approved by "the Attorney General, the Deputy Attorney General, or any assistant Attorney General."*
>
> 3. There must be a certification that the testimony may be necessary for the public interest and that the witness has refused or is likely to refuse to testify because of his privilege against self-incrimination.

At that point, a district judge performs the ministerial act of signing the immunity order. *In re Corrugated Container Antitrust Litigation* (2nd Cir.1981) 644 F.2d 70, *In re Daley*, (7th Cir.1977), 549 F.2d 469. The order

typically tracks § 6002 and says that "no testimony or other information compelled under the order . . . may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." This was the statute which was analyzed in *Kastigar v. United States* (1972), 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, in which the old case of *Counselman v. Hitchcock* (1982) 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110, was explained and distinguished. In *Kastigar* it was held that the statute did not grant transactional immunity and that the grant was limited to use. "The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute, like the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources." When the statute is followed, there is a formal, understandable record of the immunity granted and its extent, but, with pocket immunity, no one is sure what the deal is, and there is no adequate record—statistical or otherwise. An underlying purpose of the statute is to reduce to written record the identities of persons granted immunity to permit necessary comparison at a later time of their relative guilt, as compared with persons not let off the hook. With the informal pocket immunity, only a few of the grants come to light, and clear Congressional purpose behind the law is defeated. The statute cannot be read to mean anything other than a limitation on immunity grants to requests made by a "United States Attorney", approved by "the Attorney General, the Deputy Attorney General, or any assistant Attorney General". Congress did not delegate to Tax Division Assistants any right to formally or to informally deal out immunity to the objects of their bounty, but here persons identified as targets of the grand jury were later bargained out of the case by Messrs. Snyder and Blondin. Whether there was any approval of the gifts of pocket immunity, and if so, by whom, I know not, but I do know that there was not compliance with 18 U.S.C. §§ 6002-

6003, and I do know that the United States Attorney did not authorize the pocket immunities granted by Tax Division lawyers.

This is especially troublesome in this case in light of the record made concerning the witness Richard Bell who was allegedly targeted by the grand jury (or at least by Mr. Snyder and Mr. Blondin). Mr. Bell was represented by his brother, Malcolm, an attorney practicing in New York City, and a witness I found to be straightforward, fair, convincing, and most generous to Mr. Snyder. Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told by Mr. Snyder that if Richard "testified for Mr. Kilpatrick, all bets are off." Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of "all bets are off" wouldn't confront us. Under the statute, all bets weren't off if Richard Bell testified for Mr. Kilpatrick, although he could have been prosecuted for perjury if he testified falsely, but incriminating testimony given by him couldn't be used in a prosecution of the charges with which he was threatened. If the statute had been followed, the government couldn't welch on the bet of not using any incriminating testimony and I doubt that it can welch on that bet when the immunity grant is in pocket form. All too often, pocket immunities are carelessly granted, and sometimes they grant transactional immunity which Congress has not authorized. It is not surprising that there was uncertainty and misunderstanding in this instance. Grand jurors can't be expected to know the requirements of law concerning lawful immunity grants, and if the prosecutor ignores the statute, the grand jury should be told that witnesses are testifying under a side deal made with the witness by the prosecutor. The nature and informality of the immunity grant might bear on a grand juror's evaluation of the credibility of a witness, especially if the grand juror knew of the short cut used by the prosecution.

James Treece is a former United States Attorney for the District of Colorado. He was representing one of the targets of the grand jury investigation, and he was served with a subpoena duces tecum to produce records before the grand jury. He told the IRS Special Agent/Grand Jury Agent/Assistant to the prosecutor who served him that he had no such records in his possession, to which the agent, speaking in which capacity I know not, responded, "You're a liar." I guess that at this point this "man of many occupations" decided to act as a grand juror and pass on credibility. That this was said is denied, but I cannot disregard the testimony. I have no knowledge that any such comment was communicated to the grand jury, but Mr. Treece was required to testify after being called a liar by the "grand jury agent", and although I doubt that Mr. Treece was intimidated, other witnesses would have been.

We have not one but two problems under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246. With full knowledge that he was represented by counsel, Declan O'Donnell appeared before the grand jury against the advice of his counsel, and that advice was known to the prosecutors. The government argues that O'Donnell was a lawyer and that he appeared voluntarily. I don't think that this is any answer to *Massiah*, although I concede that the case deals with an indicted defendant and O'Donnell was not then indicted. The government excuses its conduct saying it is permitted under *Edwards v. Arizona*, 451 U.S. 477, 478, 101 S.Ct. 1880, 1881, 68 L.Ed.2d 378. I don't think that *Edwards v. Arizona* is apposite. That case has to do with *Miranda* rights, and, although the government asks that I read footnote 9 of the opinion, I think that footnote 8 has more to do with the *Massiah* problem. I do not rule that there was or was not a violation of *Massiah* in the case of Mr. O'Donnell's testimony before the grand jury because such a ruling is not necessary to this memorandum, but defendant's argument isn't frivolous.

Robert G. Morvillo is a prominent lawyer practicing in New York City, and his testimony was taken by telephone. He represented the Bank of Nova Scotia, and he testified concerning the activities of Mr. Scharf in going to Puerto Rico to play cop in a further and total blurring of the distinction between prosecutor and investigator. In its brief, the government sees no impropriety in this conduct, but I remind of the Advisory Committee's comment that "Federal crimes are 'investigated' by the FBI, the IRS or by Treasury Agents and not by *government prosecutors* or the citizens who sit on grand juries." (They surely aren't investigated by "reviewers", something next to be discussed.) In any event, I have no doubt that when a prosecutor turns cop, he loses his *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 prosecutorial immunity.

While in Puerto Rico, Mr. Scharf conducted a surveillance of some little girls and tailed them to their home. This let him question their mother as to the whereabouts of his prey who happened to be her husband, and who is a Bank of Nova Scotia employee. Of course, Mr. Scharf must have known that the wife couldn't have been compelled to testify to her husband's whereabouts, even under the lessened privilege adopted in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186. As an investigative technique tailing the little girls and quizzing the wife may have been brilliant police work, but I am quizzical as to the propriety of a lawyer questioning someone he knows he couldn't question in court because of an absolute privilege which, according to *Trammel*, can be waived only with full knowledge of the incompetence to testify. It seems to me that whatever may be the obligations of an IRS agent, a prosecutor owes a duty not to question a wife about her husband's whereabouts unless *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 has been overruled, and it hasn't been. Totally apart from the propriety of Mr. Scharf's actions in Puerto Rico under *Trammel*, the witnesses were employees of the

Bank of Nova Scotia, well known to Mr. Scharf to be represented by Mr. Morvillo. He says that interviews conducted by Mr. Scharf violate *Massiah*; the government says they don't, and I express no judgment as to who is right or wrong, but undeniably, there is a problem, and I think that the problem was well known to Mr. Scharf when he visited Puerto Rico.

Next we come to still another confusion in who occupied what job. It seems that within the administrative procedures of the Department of Justice sometimes conferences can be arranged with "reviewers" who are higher ups in the Tax Division. Many lawyers are of the impression that the 'reviewers" occupy a sort of quasi-judicial capacity to pass judgment on whether a case should be prosecuted, and that they are pretty much like the Appellate Staff on the civil side of the Tax Division. Experienced tax lawyers think that a "reviewer" is someone with whom compromise can be discussed. Moreover, from time immemorial, lawyers have dealt with one another in trying to settle cases in the belief that they can be straightforward without having their words thrown back at them at time of trial. The IRS hasn't always shared this view, and problems with the IRS played no small part in the enlargement of the coverage of the common law rule by the enactment of Rule 408 of the Federal Rules of Evidence. That rule now provides, "Evidence of conduct or statements made in compromise negotiations is likewise not admissable."

During the troubled history of this case, some lawyers were and some were not afforded the luxury of a conference with a "reviewer". Experienced tax lawyers think that a conference with a Reviewer offers a last ditch opportunity to avoid a criminal prosecution through negotiation, and memoranda are submitted to the Reviewer to analyze defense counsel's legal position. Conferences are then set up, attended by IRS agents, trial attorneys for the government, and defense counsel to present arguments

pro and con for more or less impartial consideration by the Reviewer. Counsel for some targets were and some were not favored with a conference with a Reviewer, but those who were so favored met with one Jared Scharf acting as the Reviewer. Something which was not disclosed to defense counsel was that he was a behind the scenes prosecutor, and, not only was he a behind the scenes prosecutor, he was actually an investigator in the case.

Rule 6(e) says that the grand jury transcript shall "remain in custody or control of the attorney for the government". The transcript of this grand jury was in the custody and control of the IRS. After the indictments were handed down, the transcript was stored away from the United States Courthouse in a room obtained from the General Services Administration by the Internal Revenue Service. It was a room assigned to the IRS, and, if the United States Attorney wanted in, he would have had to get a key from the IRS Special Agents. One cannot help fretting about this violation of the express language of the rule, and *United States v. Sells Engineering, Inc.*, —— U.S. ——, 103 S.Ct. 3133, 77 L.Ed.2d 743, coupled with *United States v. Baggot*, —— U.S. ——, 103 S.Ct. 3164, 77 L.Ed.2d 785, decided a few weeks ago, don't lessen the concern as to why the IRS retained custody of the transcripts which the rule unambiguously says should be under the control of the United States Attorney and only the United States Attorney.

There is testimony that Mr. Snyder threw his jacket on the floor and mouthed obscenities at me as I left the bench. I didn't see anything like that, and the conduct is denied. I don't know whether he did or didn't do any such thing.

When I recessed court one day, the players were in their usual positions. Mr. Snyder, Mr. Blondin, Ms. Surbaugh, and an IRS agent were seated at plaintiff's table. Mr. Scharf was in his bleacher seat, a couple of rows back in the spectator's section where he always sat while

the jury was in the courtroom. It was only when the jury left the courtroom that he sat at the counsel table and became an active trial participant. Because of suspicions I had based on testimony in the case (suspicions enhanced by post trial testimony) I was concerned about possible violations of *Massiah*, and I cautioned one and all that I didn't want the rule violated. I started to leave the bench, and Mr. Scharf yelled at me (he says that he spoke in a loud voice, but the dictionary I have suggests that the difference between a loud voice and a yell is quibble). Mr. Scharf's discourtesy amused me more than it offended me, but according to that which has been said in the post trial hearings, members of the public were distressed that a government lawyer would shout at the judge from the spectator's section of the courtroom. I thought that my court reporter's comment as we left the courtroom was discerning. She said that if her five year old son did something like that he would be sent to bed without his supper.

Rule 6(e) was amended to change the procedure for disclosure of grand jury information to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce the criminal law." No court permission for the disclosure is required, and the rule is complied with if the attorney for the government "promptly provide(s) the district court . . . with the names of the persons to whom such disclosure is made." As I read it, any "attorney for the government" can promptly provide the information, and any "attorney for the government" can make the decision to disclose. I have no fault to find with the paper trail left in this matter insofar as the disclosure requirements are concerned. I am troubled about testimony suggesting that authority to make the disclosure decisions was delegated to the IRS Special Agent/Grand Jury Agents/Prosecutor's helpers. Under

common law rules of agency, this authority couldn't be delegated to a subagent, and, especially it couldn't be delegated to an IRS agent whose fellow workers were aiming at the defendants from a different angle. My worry on this score is not lessened by an IRS letter in evidence saying that making a civil tax case under the administrative process would be difficult. *United States v. Sells Engineering* and *United States v. Baggot*, both *supra*, which settle the question of using a grand jury to collect taxes.

At the post trial hearing, Donald D'Amico, a witness called by the government, testified as to his appearance before the grand jury. He said that in the presence of the grand jury, Mr. Snyder threw his arm around his shoulder and whispered, "Don't let them cut you up." Then Mr. Snyder introduced him to the grand jury with a glowing recitation of Mr. D'Amico's war record and said, "We have a genuine war hero." After that, Mr. Snyder read off a list of names and asked if the witness would take the Fifth Amendment if inquiry was made concerning those persons. Upon receiving an affirmative answer, the witness was excused from further testimony, and it was not until the post trial hearing that Mr. D'Amico received oral pocket immunity. From what was said at the hearing I glean that counsel for Mr. D'Amico had discussed the grand jury testimony before the witness was called, and why he was called just to claim his privilege remains unexplained.

Bernard Bailor was called as a witness by the government. He is a lawyer of long experience with the Tax Division of the Department of Justice, and I was impressed with his knowledge and with his candor. He said that if a case is being prosecuted by a United States Attorney, it is not unheard of to have a Reviewer assigned to assist in a trial if the United States Attorney so requests, but that when a case is being prosecuted by Tax Division lawyers, it would be most unusual to have

a Reviewer act as a trial attorney. He also summarized the security given grand jury material in a major case he handled, and that security was far greater than the security in this case. He made the statement that abuse of the grand jury process should bring about a dismissal of the indictment.

I think that I have talked enough about the grand jury to explain why I think there has been more than an "adequate showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." There is such a motion, and, accordingly, I act under the provisions of Rule 6(e)(3)(C) which says that disclosure of grand jury matters may be made "when permitted by the court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." The Advisory Committee note to Rule 6 requires a "preliminary factual showing of serious misconduct" and I am convinced that the requirement has been met. I guess that technically, the requisite "request" to examine the entire grand jury transcript hasn't been made, but in light of this memorandum, I am sure that it will be. I have scanned the transcript, but I haven't had time to study it, and, even if I had the time, nuances recognizable by counsel wouldn't be apparent to me. Because of the showing made as to the claims of prosecutorial conduct, and without finally ruling that there was or was not any such misconduct, I order that the entire grand jury transcript dealing with this indictment be made available for study by defense counsel. Defense counsel say that a grand juror who is also a lawyer, if permitted, would testify that Mr. Snyder oppressed witnesses before the grand jury and that he was overbearing and discourteous. I leave to another judge to decide whether this evidence should be received.

The rule says, "If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct." The conditions follow: Disclosure shall be made to counsel and only to counsel. Paralegals shall not be used as substitute lawyers, and only members of the bar shall examine the transcript. They shall hold secret matters they learn, and they shall discuss them with no one other than co-counsel, and, insofar as necessary to the preparation of their arguments, with their clients. Typists given direct or indirect information concerning the content of the transcript shall receipt for a copy of a written order commanding that they hold secret any information learned by them as to what took place before the grand jury, and those receipted orders shall be filed with the clerk. During the time a transcript is being used to prepare arguments in this case, counsel shall be personally responsible for its secrecy, and when not in actual use, the transcript shall be placed in locked storage to which only counsel have access. When need for the transcripts no longer exist, all copies of it shall be returned to the United States Attorney to remain in his custody and control. All briefs disclosing grand jury testimony shall be sealed.

I make this ruling because I think that disclosure of the transcript is necessary in the interest of justice, and I make it because of recent action by the United States Court of Appeals for the Tenth Circuit. I also have in mind that which I anticipate the future holds in store for me. I noted earlier that Judge Kane has dismissed all except one count of the indictment, and the government has appealed his ruling. Because the prosecutorial misconduct, if proven, may result in a dismissal of the entire indictment, the Court of Appeals has ordered a partial remand to permit full development of the facts by all defendants. The remand is of such recent date

that other defendants cannot be adequately prepared, and they should be permitted to participate in the matter to whatever extent they desire. They may be satisfied with the record made, or they may want to expand on it. Even defendant Kilpatrick's lawyers may want to expand the record after reading the full transcript. I cannot, and I do not rule on the motion to dismiss. I earlier asked for suggestions as to remedy, and the government has said that suggestions are premature. I think that is correct. Dismissal is a possibility under a theory of a totality of the circumstances, and it is because proof of repeated misconduct is necessary to order dismissal that I have discussed the many accusations. See, *U.S. v. Gold*, (1979) D.C.Ill. 470 F.Supp. 1336. But dismissal is a last resort seldom used. *U.S. v. Narciso* (1976) D.C.Mich. 446 F.Supp. 252. Contempt is a possibility, and it is the remedy usually suggested. See, *U.S. v. Hoffa* (6th Cir.1965) 349 F.2d 20, *U.S. v. Dunham Concrete Products* (5th Cir. 1973) 475 F.2d 1241, *U.S. v. District Court* (4th Cir.1956) 238 F.2d 713. Disciplinary proceedings are a possibility, and the government has advised that "all of the allegations under consideration have been referred to the Office of Professional Responsibility" of the Department of Justice. Our local committee on conduct would also have jurisdiction of some of the matters.

Because further hearings are essential to a ruling on the motions to dismiss, and, perhaps, because Rule 605 of the Rules of Evidence, but more importantly because I plan to quit the judging business before the hearings can be completed, I make no ruling on and I intimate no belief as to what should be done with the dismissal motions. This decision will have to be made by Judge Kane, as will all other decisions concerning remedy.

No defendant other than defendant Kilpatrick is interested in the motion for new trial, and I am the only judge who should rule on it because I was there and

watched in amazement the trial's conduct. But little discussion is necessary to this ruling. I have talked about the testimony of Richard Bell and his brother. I heard that testimony outside the presence of the jury, and I wouldn't let the jury hear it. I think that was an error, and I don't think that I should put the parties to the expense of having the Court of Appeals tell me it was error. The witness was a key to the prosecution's case, and testimony as to the alleged pressures was important to an evaluation of his credibility. The pocket immunity and the circumstances of its grant bear on credibility. I initially thought that the testimony went only to prosecutorial misconduct which is for the court to determine, and I overlooked the credibility aspect of the implied threat coupled with the pocket immunity grant just as I overlooked the right of the jury to know that immunity wasn't granted the way Congress says it shall be. The jury should have heard the testimony and it might have changed some juror's mind. As a trial lawyer I didn't like the phrase "harmless error", and as a trial judge I don't use it when the error has any substance at all. This error has substance.

One Wilson Quintela was subpoenaed by the government, and he was arrested as a material witness. The prosecutors exercised a power possessed only by the court, and they released the man from subpoena. He promptly returned to his home in Brazil. Lawyers can't substitute themselves for the court to release a witness from subpoena. *U.S. v. Sanchez* (2nd Cir. 1972) 459 F.2d 100. At the time of trial, the government admitted that their conduct was in error, and every effort was made to get the witness to come back from Brazil when defense counsel said that he was relying on the availability of the witness. After the trial started, the government said that the witness would return, but defense counsel said at that point he had developed his trial strategy on the basis of the release of the witness from the subpoena.

He may have correctly thought that an interruption of the trial to permit travel from Brazil would be detrimental. That the government was guilty of no evil intent I am sure, but that the defendant suffered no harm I am not sure. Standing alone, this is one mistake I might reluctantly say was "harmless error", but coupled with other things, I can't so rule.

If there is any one thing that Tenth Circuit has been vehement about it is expressions of personal opinions by counsel as to whose testimony they believe. That rule was violated here, and I suggest that a review of the grand jury transcript may show frequent violations of the rule during grand jury proceedings. My thinking on this score goes immediately to the appearance of Professor Hjorth before the grand jury. I jumped in during final argument to try to lessen the error of the comment, but I doubt that I cured it.

It is argued that in the presence of the jury one of the agents stared at and laughed at the defendant. The prosecution says that this didn't happen, and that if it did, I would have seen it. I didn't see it, but that doesn't mean that it didn't happen, because no judge sees everything which goes on in a courtroom. This is especially so because I was concentrating my attention on Mr. Scharf's glowering as he sat in the second row of the spectator's section, and I doubt that defense counsel could see him. I mention this only because it is one more tiny aspect of the atmosphere of the trial. It was an atmosphere of unfairness and overreaching illustrated in small degree by ex parte telephone calls to my law clerk made by government counsel inquiring through the back door to learn my thinking as to some legal situations in the case. (Colloquy about this appears in the record, and, consistent with their denials of what so many others say, government counsel deny my law clerk's statements as to the conversation.) The case is the only trial I have ever conducted in which the courtroom deputy complained

about discourtesy on the part of counsel, and I suppose that it goes without saying that it was not defense counsel who were discourteous. (An apology by government lawyers was extended later.)

Other arguments are advanced supporting the new trial motion, but I don't think that I need extend this opinion by discussing them. I have taken them into account in my thinking. Usually, when a case goes to the jury, there are no more difficulties to be encountered, but that's not so in this ill-starred case which had its first questionable conduct during the opening two minutes of grand jury investigation and which had conduct suspect under the Canons of Professional Responsibility lasting into post trial hearings. While the jury was deliberating a note was received. I notified counsel on both sides, and a hearing was held in open court with the defendant present, defense counsel present. Ms. Surbaugh of Colorado's United States Attorney's Office, and Mr. Blondin were there on behalf of the government. (Messrs. Scharf and Snyder didn't show up, although when the jury retired all counsel had been told to stand by for jury questions or a verdict). We discussed the answer which should be given to the jury, and we all agreed on it. The answer was written, and a copy was given to both sides.

I was more than a little surprised when a telephone call from Mr. Scharf was received a few minutes later. He had decided that he wasn't satisfied with that which those who saw fit to come to the hearing all agreed to. He demanded a further hearing, and I told him we would have one right away. He then made the most ridiculous demand I have ever heard in the almost 50 years since I graduated from law school. Mr. Scharf directed that I instruct the jury to "cease its deliberations" until he could have his hearing. This direction was made on the telephone and it was obviously not made in the presence of defendant or defense counsel. To accede to this absurd

demand would have created irretrievable error under Rule 43 and under *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1. That error I avoided because I told Mr. Scharf I wouldn't even consider obeying his command to instruct the jury to quit deliberating. We did have the hearing and it didn't take long. Exactly what was said at that time is part of the record in the case.

After the jury verdict, timely motions were filed, and it was apparent from a reading of them that Mr. Scharf, Mr. Blondin and Mr. Snyder were going to have to testify about matters raised in the motions. Their recognition of the factual dispute is clearly shown in the flippant brief filed in opposition to the motions. At the outset of the hearing I inquired concerning the ethical bind in which the prosecutors found themselves, and I asked if other counsel should not be handling the hearing. I admit to surprise when I was told that top lawyers in the Tax Division of the Department of Justice saw nothing wrong with the continued participation in the case of lawyers whose testimony was quite obviously going to be required. We started the hearing with participation by two of the lawyers who were essential witnesses. (One was said to be in trial somewhere else.) The hearing went for a little while, when, suddenly, there was a 180 degree change of direction, and government counsel announced that they wanted to withdraw. They were permitted to do so, and the hearing recessed. Mr. Alexander took over, and he has performed ably and ethically. However, he was handicapped by lack of time to prepare, and the hearing which I had hoped to complete weeks ago had to be continued for later testimony. We are still waiting for that testimony.

This brings us down to date. I have already explained that I cannot and I do not rule on the motion to dismiss, but I do grant the motion for a new trial. I deny the motion for judgment of acquittal, but I do so without

intent that this is the "law of the case", and leave it to another judge to take a fresh look at the motion if the case is tried again.

ORDER

Rule 6 of the Federal Rules of Criminal Procedure provides that matters occurring before a grand jury shall be secret, subject to a few exceptions. One exception is that there may be disclosure when directed by a court in connection with a judicial proceeding. I have directed that there be some disclosure of grand jury matters, and undoubtedly, typists will have to learn what is contained in grand jury transcripts in the performance of their secretarial work for lawyers who read the transcripts. Accordingly, such disclosures as may be necessary to the accomplishment of secretarial duties is authorized, but any typist who so learns of any such grand jury matters is ordered to keep secret such information. Rule 6 itself provides that violation of the secrecy requirements of the rule may be deemed contempt of court, and violation of this order may be deemed contempt of court.

APPENDIX F

STATUTES AND RULES INVOLVED

18 U.S.C. Sec. 6002. IMMUNITY GENERALLY

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part [18 USC §§ 6001 et seq.], the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. Sec. 6003. COURT AND GRAND JURY PROCEEDINGS

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or pro-

vide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part [18 U.S.C. § 6002].

Federal Rules of Criminal Procedure, Rule 6(d). WHO MAY BE PRESENT

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Federal Rules of Criminal Procedure, Rule 6(e). SECRECY OF PROCEEDINGS AND DISCLOSURE

(1) General rule. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) Sealed indictments. The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.